SUPREME COURT OF THE UNITED STATES.

No. 261.

ASA HUNT, FRANKLIN H. EATON, JOSEPH P. MANNING, AND GEORGE ARMSTRONG, APPELLANTS,

vs.

EPHRAIM H. BENDER, CHARLES A. HENRY, ANAN HENRY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEBRASKA.

INDEX.

	Original.	Print.
Style of court	1	1
Decree of supreme court	2	1
Appeal	3	1
Clerk's certificate	3	2
Transcript from district court	4	2

1 UNITED STATES OF AMERICA, *Territory of Nebraska, ss:*

Proceedings had in the supreme court of the Territory of Nebraska, at the June term thereof, begun and held at the capitol of said Territory on the 19th day of June, one thousand eight hundred and sixty-five, and at which were present the following named officers of said court:

Honorable William Kellogg, chief justice; honorable William F. Lockwood, associate justice; honorable E. S. Dundy, associate justice; Daniel Gantt, esq'r, attorney for United States; Casper E. Yost, esq'r, United States marshal; John H. Kellom, esq'r, clerk supreme court, Neb. Ter.

ASA HUNT, FRANKLIN H. EATON, JOSEPH P. Manning, and George Armstrong, appellants,
vs.
EPHRAIM H. BENDER, CHARLES A. HENRY, and Anan Henry, appellees.

Be it remembered, that on the 9th day of January, one thousand eight hundred and sixty-five, came into the said supreme court the said Asa Hunt, Franklin H. Eaton, Joseph P. Manning, and George Armstrong, appellants, by Messrs. Redick & Briggs, their solicitors, and filed in the office of the said clerk of the said court a tran-
2 script of the record of certain proceedings duly had and taken in the district court of said Territory for the first judicial district and county of Douglas, a true copy of which transcript is hereto annexed and marked Exhibit A.

And afterwards, at the aforesaid June term of said supreme court, and on the 25th day of July, one thousand eight hundred and sixty-five—honorable William F. Lockwood, associate justice, honorable E. S. Dundy, associate justice, and honorable William Kellogg, chief justice, presiding—this cause came on duly to be heard and determined upon said transcript so as aforesaid filed in said court, and thereupon the following proceedings were duly had:

ASA HUNT, GEORGE ARMSTRONG, and OTHERS, appellants,
vs.
EPHRAIM H. BENDER, appellee.
No. 142.—Appeal.

At this term came the said appellants by their solicitors, Messrs. Redick & Briggs, and the said appellee by George B. Lake, his solicitor, and thereupon this cause came on to be heard upon the transcript of the proceedings had in the court below; and the written arguments of the respective solicitors, and the court being fully advised in the premises, find the equities of the case with the
3 said Ephraim H. Bender.

It is therefore ordered, adjudged, and decreed by the court that the said decree of the court below be, and the same is hereby, affirmed, and the said complainants' said bill be, and the same is, dismissed at the costs of the said appellants; and that execution issue from this court to collect the same. Thereupon the said complain-

ants prayed an appeal to the Supreme Court of the United States, which is allowed upon executing a bond according to law in the sum of two hundred and fifty dollars.

UNITED STATES OF AMERICA, *Territory of Nebraska, ss:*

I, William Kellogg, jr., clerk of the supreme court of the Territory of Nebraska, do hereby certify that the foregoing is a true and faithful transcript of all the proceedings had in said cause in said court, and remaining of record in this office.

Witness my hand and the seal of said court this 5th day of November, A. D. 1865.

[SEAL.] WM. KELLOGG, JR., *Clerk.*

[5 cts. rev. stamp, cancelled.]

4 Exhibit A, being a true copy of a transcript of the record of the district court filed in the supreme court of said Territory as is above stated.

Exhibit A.

UNITED STATES OF AMERICA,
Territory of Nebraska, county of Douglas, ss:

Pleas before the district court in chancery, of the first judicial district, Territory and county aforesaid.

Be it remembered, that at a regular term of the district court of the first judicial district of the Territory of Nebraska, appointed to be held at the court-house in the city of Omaha, in the county of Douglas, on the third Tuesday of April, in the year of our Lord one thousand eight hundred and sixty-two, and adjourned by order of
5 court until the sixth day of May following, and again adjourned by order of court to the 8th day of May aforesaid—present, honorable W. F. Lockwood, judge, Thomas L. Sutton, sheriff of said county, and J. H. Kellom, clerk of said court—the following proceedings were had:

Heretofore, to wit, on the 25th day of March, A. D. 1862, Franklin H. Eaton, Joseph P. Manning, George Armstrong, and Asa Hunt filed in the office of the clerk and register of said court their bill of complaint in chancery, which said bill was in the words and figures following, to wit:

In chancery.

To the Hon. William P. Kellogg, judge of the first judicial district, Territory of Nebraska, Douglas county:

Complaining, showeth unto your honor your orators, Franklin H. Eaton, of the city of Pittsburg, in the State of Pennsylvania, Joseph P. Manning, George Armstrong, and Asa Hunt, of the city of Omaha, Nebraska, that they are respectively the judgment creditors of Charles A. and Anan Henry, of this Territory; that on the 11th day of August, 1857, the said Anan Henry was seized in fee simple of the fol-

lowing described estate, situate in the city of Omaha as platted
6 and lithographed by the Council Bluffs and Nebraska Ferry Co., to wit: The west forty-four (44) feet of lot seven, (7,) in block one hundred and twenty-two, (122;) that at the time aforesaid there had been erected upon the east 22 feet of said west 44 feet of said lot a brick building of the value of from (6) six to eight thousand dollars, and that during the month of August and the fore part of September, in the year aforesaid, the west 22 feet of said lot was being improved by the said Anan Henry, in the erection of a three-story brick building, which would and did involve an expense of from six to ten thousand dollars, which building was not finished until the spring of 1858.

Your orators further say that at the June term of the said court, on the law side thereof, George Armstrong, one of the complainants, recovered a judgment against these respondents, Chas. A. and Anan Henry, in the year 1859, for the sum of $444 58 and $12 and $\frac{95}{100}$ costs, and that on the 3d day of Sept., 1861, an execution was issued by the clerk of said court and placed in the hands of the sheriff of Douglas county, which execution was in due form commanding the sheriff to make of the goods and chattels and for the want thereof of the lands and tenements of defendants the amount of said judgment and costs, all of which will at large appear upon the records of
7 said court; and the 13th day of September, in the year aforesaid, the said sheriff returned upon said execution "Rec'd this Sept. 4th, and after diligent search no goods, chattels, lands, or tenements, of the within-named defendants whereon to levy."

Your orators further show unto your honor that at the March term of said court, 1861, on the law side thereof, Joseph P. Manning, another of these complainants, recovered a judgment against the said respondents and Anan Henry for the sum of five hundred and thirty-nine and $\frac{64}{100}$ damages and $4-$\frac{80}{100}$ costs, and on the 5th day of September, 1861, an execution in due form of law was issued and placed in the hands of the sheriff of Douglas county, commanding him to make out of the property of said defendants found in his county the amount of said judgment and costs, and on the 13th day of September, 1861, said sheriff returned said execution "That after diligent search I can find no goods, chattels, lands, or tenements of the within-named defendants whereon to levy."

Your orators further show unto your honors that at the June term of said court, 1861, upon the law side thereof, Franklin H. Eaton, another of these complainants, recovered against these defend-
8 ants a judgment for the sum of six hundred and eighty seven and $\frac{17}{100}$ dollars damages, and $16 and $\frac{95}{100}$ costs; and on the 3d day of September, 1861 an execution was issued in due form and placed in the hands of the sheriff of said Douglas county, commanding him, &c., hereinbefore set forth; and the 13th day of September, 1861, the said sheriff makes the same return upon the said execution as upon those before issued and returned as hereinbefore set forth.

Your orator further says that at the Oct. term of said court, A. D. 1861, Asa Hunt, the other of these complainants, recovered a judg-

ment against these defendants for the sum of five hundred and ninety-six $\frac{20}{100}$ dollars, and on the 7th day of March, 1862, an execution was issued in due form and placed in the hands of the sheriff commanding him, &c., as hereinbefore set forth; and on the 22d day of March, 1862, the said sheriff returned said execution as in the cases before set forth, as will fully appear upon the several executions herein referred to and upon the records of this court.

Your orators further show unto your honor that the consideration of the last three judgments hereinbefore set forth was for
9 labor and work done and performed upon the building standing upon the west 44 feet of lot 7, in block 122, in the city of Omaha, and for brick and materials used in the erection of the same. Wherefore your orators, Manning, Hunt, and Eaton, ask the court to decree therein a lien upon said premises for the amount of their respective judgments, interest, and costs.

Your orators further state that since the spring of 1857, the said Chas. A., and Anan Henry, have been totally and notoriously insolvent, and unable to meet their liabilities, and are so at this time. And that on the 15th day of August, 1857, Anan Henry executed his note to one Ephraim H. Bender, for the sum of four thousand and eighty dollars due in one year from its date, and to draw interest after maturity, at the rate of 3 per cent. per month, and for the purpose of securing the payment of said note executed to said Bender of Albany, New York, (whom your orators ask may be taken a party defendant to this bill,) a pretended mortgage upon the west 44 feet of lot 7, in block 122, in the city of Omaha, in which mortgage Lydia Henry, wife of the said Anan, joined and duly acknowledged the same so as to entitle it to record.

Your orators charge that the said Anan Henry never received the amount of said note and mortgage from said Bender, but that
10 the making of said note and the execution of said mortgage was done to delay, hinder and defraud the creditors of the said Henrys, and especially your orators.

Your orators further say at the time of the making of the said note and mortgage, the liens of your orators, Manning, Hunt, and Eaton, had attached to the said buildings upon said west 44 feet of 7, in block 122, and that the said Bender well knew at the time he took said mortgage, and also well knew of the total insolvency of the said Henrys. And your orators further say for that reason your orators never filed their respective liens as by statute required.

Your orators further show unto your honor at the time of the making of said mortgage, the brick building upon the west 22 feet of said west (44) four feet was in process in erection. And that your orators, Manning, Hunt, and Eaton, were engaged in the erection of said building for said Henry, and that the defendant, Ephraim H. Bender, at the time of taking of said mortgage was well aware that the said Henrys were indebted to your orators for work and labor done, and brick and material furnished for the same, and well knew of the insolvent condition of the Henrys at the time, but for the express purpose of delaying and defrauding the creditors of said Henrys,

11 loaned him, the said Henry, a small sum of money, and then took from him, said Henry, a mortgage covering the enormous sum of $4,080, the same to draw interest at the rate of 3 per cent per montl. after maturity.

Your orators further charge that at the giving of said mortgage, the insolvency of the said Henrys was fully discussed by the agent of the said Bender and the said Henrys, and the probability of succeeding in the fraud hereinbefore set forh, and further charge that the said Bender expressed his fears as to his ultimate liability for the claims of your orators' liens upon said building then in process of erection, and therefore advanced a much less sum upon said security than he otherwise would have done.

Your orators further show unto your honor that said mortgage stood upon said premises from the 25th day of August, 1857, until the 11th day of February, 1859, before proceedings were commenced to foreclose the same, and in the mean time a creditor's bill has been filed against the said Henrys, and the premises herein described was, together with other property, made the subject of said proceeding.

Your orators further show unto your honor that the said respondents finding that the said premises was about to go into hands
12 and control of their creditors, Chas. A. Henry urged the said Bender to commence proceedings to foreclose the aforesaid pretended mortgage for their benefit. And the said Bnder then and there, and for the sole purpose of delaying and defrauding your creditors, did commence proceedings to foreclose said mortgage, alleging to be due thereon some five thousand dollars in money.

And your orators further allege that for the fraudulent purpose aforesaid, a suit was formally commenced and service had upon some of the defendants, but no defence was made by either of the Henrys to said proceedings, but said bill was taken pro confesso, and the property was afterwards sold for the amount of said pretended mortgage and interest, amounting in all to about $5,500. That afterwards, to wit, on the 8th day of December, 1859, for the same fraudulent purpose and design of defrauding your orators and the creditors of the said Henrys, the said Chas. A. Henry, representing himself to be the agent of Anan and Lydia Henry, and Abigal S., his wife, came into open court and consented for them, and for himself and wife, that the sale of said mortgage premises for the sum of $5,500 or thereabouts, might be confirmed by the court, and thereby giving
13 the said Bender the immediate possession and control of said premises and the rents and profits thereof.

Your orators charge that at the time of the consenting of the said Henry to the confirmation of said sale, there was an express agreement that the said Bender would formally bid in the property, but hold the same subject to the redemption of the said mortgagor or the said Charles A. Henry, at any time thereafter, by his paying the actual amount of money loaned and interest to the said Bender; and further there was no due and legal notice of said sale; or in lieu of the redemption of said premises, he, said Bender, would redeed to said Henry the half of said mortgaged premises, and by reason of

said agreement and understanding other parties were induced not to bid upon said mortgaged premises at said sale aforesaid.

Your orators further allege that at the time of the sale of said premises for the sum aforesaid, it was in fact worth from 12 to 18 thousand dollars, and that the rents and profits arising therefrom amounted to from $2,000 to $3,000 annually.

Your orators therefore charge that the said judgment of foreclosure was obtained by collusion and fraud by the said Henrys and the said Ephraim H. Bender, as against the creditors of said Henrys,
14 and especially your orators, and that since the sale of said premises, the rents and profits arising therefrom have been more than sufficient to refund to the said Bender the actual amount of money advanced upon said premises and interest.

Your orators further charge that the said Anan Henry was never served with process of subpœna in said foreclosure suit as by law required, but said Bender in his anxiety to defraud your orators and the creditors of said Henry, represented to the court that personal service had been had upon him, said Henry, and there being no defense interposed, took said bill pro confesso against the said Anan Henry as well as others.

Your orators further charge that at the time the said Charles A. Henry appeared in open court and consented on the part and in behalf of the said Anan, to the confirmation of the sale of said mortgaged premises as hereinbefore set forth, he held the legal title to the said premises, the same having been before that time conveyed to him by the said Anan and wife, and that he entered the consent of the said Anan to said confirmation, without any authority
15 whatever from the said Anan, or any knowledge on his part, all of which said Bender well knew, but entered the said consent under the agreement and express understanding hereinbefore narrated.

Your orators further charge that Chas. A. Henry was not the agent of said Anan Henry, to consent to the said confirmation of sale, but did so on his own account and for his own interest, without the knowledge or consent of the said Anan Henry. And further charge that the said Chas. A. Henry is not and was not a member of the bar at the time he entered said consent in said court for the said Anan, and therefore and for that further reason does not bind said Anan or any of those whom he pretended to represent.

Yonr orators further charge that since the 8th day of Dec., 1859, the said Ephraim H. Bender has had the possession and control of said premises, renting and using them appearingly as his own, and refuses to have or discharge or recognize your orators' judgments or lien upon said premises, which said judgments are in full force and effect, unpaid and unsatisfied, while your orators charge the
16 fact to be that he is the fraudulent trustee of the creditors of the said Anan and Chas. A. Henry. And that the said Bender is still pretending to be the bona fide owner of said premises, and is using and renting the same.

And your orators had well hoped that the said defendants would have

discharged the liens and judgments of your orators, as by their said agreement and promises in equity and good conscience they ought to have done. But now so it is, may it please your honor, that the said Anan and Chas. A. Henry, and said Ephraim H. Bender, combining and confederating together, with divers persons whose names to your orators at present are unknown, but which when *when* discovered they pray may be taken parties to this *to this* their bill of complaint, with appropriate words to charge them in the premises, but contriving how to injure and defraud your orators in this behalf, makes many objections, and utterly refuses to pay said judgments or liens, pretending at times that the said Bender did advance to the said Henry the full sum of $4,080, and bona fidely foreclose said mortgage, and obtain title to the said premises, free from incumbrances. At other times claims that, although he took the said mortgage, subject to the
17 liens aforesaid of your orators thereon, yet for the reason the said liens were not filed as by statute required in the office of the register of deeds, that the premises are clear and free from incumbrance so far as said liens are concerned, while your orators expressly charge the contrary to be true, that the premises are subject to said liens, from the fact that the executing of said note and the making of said mortgage was conceived in fraud and foreclosed in corruption, to hinder and delay the creditors of the said Henrys; all of which actings and doings of the said defendants and their confederates is contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators.

In tender consideration whereof, and inasmuch as your orators are remediless by the rules of the common law, and cannot have adequate relief except by the aid and interference of this honorable court, where matters of this kind are properly cognizable and relievable—to the end, therefore, that the said Chas. A. Henry, Anan Henry, and Ephraim H. Bender, and their confederates when dis-
18 covered, may full, true, direct, and *and* perfect answers make (your orators hereby waiving the necessity of such answers being made on the oath of said defendents,) according to the best of their knowledge, information, recollection, or belief, to all and singular the matters and things in this your orators' bill of complaint contained, and that as fully and at large, paragraph by paragraph, as if the same were here again repeated and you and each of you thereunto separately interrogated, and especially that the said Bender and his confederates discover and set forth the exact amount of money loaned to the said Henry upon the said premises as security; whether the loan was negotiated with said Henry in person, or by an agent; and if by an agent, who; what kind of money was loaned, whether gold, bank notes, or Omaha city scrip; and what rate of interest was agreed upon to be paid for the use of said money; and whether there was any, and what, understanding between you and the said Charles A. Henry in regard to the right of himself, as mortgagor, to redeem said premises at any time after the sale, in consideration that the said Charles A. would enter the consent of himself, wife, and others to the confirmation of said sale; whether you was not

19 fully advised of the fact that your orators had liens upon the said premises at the time of taking said mortgage; and that the Henrys were notoriously and totally insolvent; and that the said judgments of your orators may be decreed by this honorable court to be direct and prior liens upon said premises, and that the judgment of foreclosure be declared by this court fraudulent and void as against the creditors of the said Henrys, as especially your orators, and such other and further relief in the premises as to your honor may seem right, proper, and equitable. May it please your honor to grant to your orators the writ of subpœna to be issued out of and under the seal of this honorable court to be directed to the Charles A. Henry, Anan Henry, and Ephraim H. Bender, and their confederates when discovered therein, and thereby commanding them on a certain day, therein to be inserted, to be and appear before this hon. court, and answer all and singular the premises in this behalf, and stand to and abide by and perform such orders, directions, or decrees in the premises as shall be made therein. And your orators will ever pray, &c.

REDICK & BRIGGS,
Sol. Complainants.

Omaha City, March 4, 1862.

20 TERRITORY OF NEBRASKA, *Douglas County, ss:*

On this day of March, 1862, personally appeared me, George Armstrong, probate judge in and for said county, Asa Hunt, who being duly sworn deposes and says, I am one of the parties, complainants in this bill, and I have heard the same read and know the contents thereof, and the same is true of my own knowledge except such of said facts as are founded upon information and belief, and as to those I believe them to be true.

ASA HUNT.

Subscribed in my presence and sworn to before me this 20th day of March, 1862.

[SEAL.] GEORGE ARMSTRONG, *Probate Judge.*

And afterwards, to wit, on the said 25th day of March, A. D. 1862, there was issued out of and under the seal of said court, a subpœna in chancery in said cause, which said subpœna was in the words and figures following, to wit:

The Territory of Nebraska to Ephraim H. Bender, Charles A. Henry, and Anan Henry, greeting:

21 We hereby command you and each of you that you appear in the district court of the first judicial district within and for the county of Douglas, in chancery, on the 28th day of April, 1862, to answer a bill of complaint exhibited against you in our said court by Asa Hunt, George Armstrong, Franklin H. Eaton, and Joseph P. Manning, and to do further and receive what our said court shall have considered in that behalf.

The sheriff of Douglas county will return this writ on the 7th day of April, A. D. 1862.

Witness honorable Wm. P. Kellogg, judge of our said court, the 25th day of March, 1862.

[SEAL.] J. H. KELLOM, *Register, Solicitor.*

On which said subpœna were indorsed the following words and figures, to wit:

District court, Douglas county, in chancery.

ASA HUNT *et al.* *vs.* E. H. BENDER *et al.* } No. 227.—Subpœna in chancery.

March 26th, A. D. 1862, at 11 o'clock a. m., received this writ. Served same day by delivering a copy of this writ to Ezra Millard, the authorized agent of Ephraim H. Bender, E. H. Bender, Chas. A. Henry, and Anan Henry, not found in my county.

THOMAS L. SUTTON,
Sheriff of Douglas County, Nebraska Territory.

Fees $1 05.
Filed April 7th, 1862.

J. H. KELLOM, *Register.*

22 And thereupon afterwards, to wit, on the 3d day of September, A. D. 1862, there was filed in the office of the clerk and register of said court, an affidavit, which said affidavit was in the words and figures following, to wit:

In district court, Douglas county, in chancery.

FRANKLIN H. EATON *et al.*, complainants, *vs.* EPHRAIM H. BENDER *et al.*, defendants.

TERRITORY OF NEBRASKA, *Douglas county, ss:*

Asa Hunt being by me first duly sworn deposes and says, that he is one of the complainants in this cause; that the bill filed in this case is for the purpose of declaring fraudulent and void a certain mortgage foreclosure had on the west 44 feet of lot 7 in block 122, in the city of Omaha, in said county, and also to make *to make* certain judgments of complainants' liens upon said premises; and affiant further says, that service of subpœna cannot be had on said defendants or either of them in said Territory; publication is therefore prayed for as provided by law and the rules of this court.

ASA HUNT.

Subscribed in my presence and sworn to before me this 1st day of September, 1862.

DAN. GANTT,
Justice of the Peace in and for Douglas County.

23 On the back of affidavit were written the following words and figures, to wit:

It is ordered that publication be made in the Nebraska Republican for 4 successive weeks according to rules of court Sept. 1st, 1862.

DAN. GANTT, *Master in Chancery.*

And thereupon, afterwards, to wit, there was filed on the 23d day of October, A. D. 1862, in the office of the clerk and register of said court, a notice and affidavit of its publication, which said notice and affidavit were respectively in the following words and figures, to wit:

Legal notice.

Ephraim A. Bender, Charles A. Henry, and Anan Henry, defendants, will take notice that on the 25th of March, 1862, Franklin H. Eaton, Joseph P. Manning, George Armstrong, and Asa Hunt, complainants, filed their bill in chancery against you in the district court for Douglas county, Nebraska, setting forth, in substance, that said complainants are all judgment creditors of said Henrys, and are entitled to have said judgments made a lien on the west 44 feet of lot seven in block one hundred and twenty-two, in the city of
24 Omaha, said county; and further setting forth, that said Bender, through fraud, obtained a mortgage on said premises, and through collusion with said Henrys caused the same to be foreclosed and said premises sold in said mortgage, in fraud of the rights of said complainants, and praying that said foreclosure and sale be declared fraudulent and void as against said complainants; that camplainants' judgments may be decreed a direct lien in said premises, and such further relief as the court may think proper to grant.

You are required to answer, plead, or demur to said bill, on or before the 20th day of October, 1862.

REDICK & BRIGGS,
Solicitors for Complainants.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

E. A. McClure, being duly sworn, deposes and says, that he is one of the printers and publishers of the Nebraska Republican, a newspaper printed at Omaha, in the said county of Douglas, that the printed notice hereto attached was published in the said newspaper four consecutive weeks next after the third day of September, 1862, that said newspaper was during that time in general circulation in the county of Douglas and Territory of Nebraska.

E. H. McCLURE.

Sworn to and subscribed before me this 22d day of October, 1862.
[SEAL.] GEO. B. LAKE,
Notary Public, Douglas County, N. T.

Printers' fees $6 00.

25 And thereupon afterwards, to wit, on the said 23d dayof October, A. D. 1862, there was filed in the office of the clerk and

register of said court an order pro confesso and default in said cause, which said order and default were in the words and figures following, to wit :

In district court Douglas county, in chancery.

F. H. EATON *et al.*, complainants,
vs.
EPHRAIM H. BENDER, CHAS. A. HENRY, and Anan Henry, defendants.

The said defendants, having been duly notified by publication to appear in this cause and plead, answer, or demur to the bill of complaint filed in this cause on the 20th of Oct., 1862, and the defendants, except Bender, having failed to plead, answer, or demur to said bill as required by said notice and the law, and they still failing to plead, answer, or demur to said bill, the same is hereby taken pro confesso as against said Charles A. Henry and Anan Henry, defendants, and their default is hereby entered.

REDICK & BRIGGS,
Solicitors for Complainants.

Oct. 23. 1862.

And to wit, on the said 23d day of October, A. D. 1864, previous to the filing of the order pro confesso and default aforesaid, the said defendant, Ephraim H. Bender, filed in the office of the clerk
26 and register of said court a demurrer in said cause, which said demurrer has been lost and cannot be found among the papers in said cause on file in said court.

And thereupon afterwards, to wit, on the 20th day of November, A. D. 1862, there was made and entered on the journal an order of the court, William P. Kellogg, judge, overruling the aforesaid demurrer, which said order was in the following words and figures, to wit :

The demurrer to the bill filed in this cause having come on to be heard, was argued by counsel, and the court, being fully advised in the premises, finds the same not well taken ; whereupon it is ordered that the said demurrer be and is hereby overruled, and the defendants are required to answer said bill by the first day of January next ; and thereupon afterwards, to wit, on the 29th day of December, A. D. 1862, there was filed in the office of the clerk and register of said court the separate answer of Ephraim H. Bender, one of the defendants, to the bill of complaint in this cause, which said answer was in the words and figures following, to wit :

The separate answer of Ephraim H. Bender to the bill of complaint of Franklin H. Eaton and others, exhibited against the said Bender and others in the district court for the county of Douglas, Nebraska,
27 *in chancery.*

And now comes the said defendant, Ephraim H. Bender, of the said defendants, and for himself by his solicitor, George B. Lake, for answer to the said complainants' said bill of complaint, or to so much

thereof as he is informed it is material or necessary for him to make answer unto, says that as to the fact of said Anan Henry being seized of the premises stated in the bill at or about the time set forth therein, said bill is true; but this defendant denies that the several improvements mentioned as having been made upon said lot were of the value stated in said bill.

And for a further answer the said Bender says that he has no knowledge, except what he has derived from the statements of said bill, that the said complainants recovered judgment against the said Charles A. and Anan Henry; nor had he at any time, nor has he now, any knowledge, information, or belief that said Charles A. Henry and Anan Henry, or either of them, were indebted to the said complainants or either of them in the sum stated in said bill, or in any other sum whatsoever: and this defendant therefore denies all the several allegations in reference thereto in said bill con-
28 tained.

And for a further answer this defendant says that he has no knowledge, information, or belief, except such information as is conveyed by said bill, that any executions was ever issued in favor the said complainants or either of them, and therefore denies all the several allegations of said bill in reference to the issuance or return thereof.

And for further answer the said defendant says that he has no knowledge whether the said Charles A. and Anan Henry, or either of them, are now or were at the time mentioned in said bill, insolvent, and therefore denies the said allegations in the said bill in relation to their insolvency. This defendant further says that he believes that the said Charles A. and Anan Henry have property and money sufficient to pay off and discharge all their debts and liabilities.

And for a further answer said Bender says that he admits that on or about the 15th day of August, 1857, said Henry executed to this defendant his certain promissory note for the sum of four thousand and eighty dollars, which bore interest after maturity at the rate of three per cent. per month, and matured one year from the date thereof, and that for the purpose of securing the payment
29 thereof unto this defendant, he at the same time executed to this defendant a mortgage upon the premises described in the bill, which said mortgage was duly recorded as required by the statute in such case made and provided.

This defendant, further answering, says that it is wholly untrue, and he therefore expressly denies, that the said Anan Henry never received the amount of said note and mortgage from said Bender; but, on the contrary, this defendant says that the said Henry did receive the whole amount of said note from said Bender; that said note was executed in good faith both on the part of said Bender and said Henry, as was also the said mortgage given and received in good faith to secure the payment of said note, which was given for money loaned to said Henry by said Bender, at the special instance and request of said Henry; that said note and mortgage was executed, as

the defendant believes, in the utmost good faith by said Henry, and with no intention on his part, as charged in said bill, to delay, hinder, and defraud the creditors of said Henrys or the said complainants.

That the said Bender had no knowledge of any such intention on the part of said Henry if any such existed, and, as before stated, the transaction on the part of this defendant was in the utmost good faith.

30

This defendant, for a further answer, states that it is wholly untrue, and he therefore denies, that at the time of the execution of said mortgage the liens of said complainants, Manning, Hunt, and Eaton, had attached to the buildings upon said premises; and this defendant denies that the said complainants, at any time before or since the execution of said mortgage, have had any lien upon said building or any portion thereof, as against this defendant or otherwise; nor have they now any valid lien thereon, as this defendant verily believes. And this defendant further saith that he never had any knowledge, information, or belief that said complainants claimed to have any lien or interest in said buildings till he was so informed by the filing of said bill of complaint; that, as this defendant firmly believes, the said pretended liens of the said complainants have no foundation either in law or equity.

And for a further answer this defendant says that it is untrue, and he therefore expressly denies, that at the time of the execution of said mortgage he, said Bender, had any knowledge, information, or belief that said complainants, or either of them, were at that time at work upon said buildings; and he also expressly denies that he had any knowledge, information, or belief that at that or at any other time he knew or had any information or belief as to the fact that said Henrys were or ever had been indebted to the said complainants, or either of them; nor in fact did said defendant know that any such persons as the said complainants had an existence, much less that they were or ever contemplated being the creditors of said Henrys.

31

Said defendant, further answering, says it is absolutely false and wholly untrue, as in said bill charged, that this defendant at that time knew of the insolvent condition of said Henrys. It is likewise wholly untrue that this defendant, for the purpose of delaying and defrauding the creditors of said Henry, loaned him, said Henry, a small sum of money and then took from him a mortgage covering an enormous sum.

This defendant also expressly denies that at the giving of said mortgage the insolvency of said Henrys was fully discussed by the agent of said Henrys and said Bender, nor was anything said as to the probability or improbability of succeeding in any of the pretended fraudulent acts stated in said bill; and he further denies expressly that he, this defendant, expressed his fears as to his ultimate liability for the claims of the said complainants or for their said pretended liens upon said buildings then in process of erection; that all the several allegations in said bill contained in reference to those

32

matters are wholly untrue and entirely unfounded in fact. Nor did this defendant loan to said Henry any less sum than he otherwise would have done in consequence of any knowledge which he had respecting any liens on said buildings by the said complainants or any one else, because he says, as before herein expressly set forth, that he has had no knowledge whatever that the said complainants had any claim against said Henrys, nor that they or either of them ever expected to have.

This defendant, further answering, says that he believes it to be true, and he therefore admits, that said mortgage was duly recorded at the time stated in said bill; that it has remained upon the records of said Douglas county ever since, but he has had no knowledge whatever
33 that said premises had ever been made the subject of a creditor's bill as stated in said bill of complaint; and this defendant expressly denies that he had or feared any apprehensions that said premises were about to go into the hands of the creditors of said Henrys as charged in said bill, nor did said Henrys, in consequence thereof, or for any other reason, nor did they at any time urge this defendant to commence proceedings to foreclose said mortgage either for their benefit or otherwise; but this defendant says that said Henrys did all in their power to prevent this defendant from commencing a suit to foreclose said mortgage, as he is informed and verily believes true; that in the commencement of said suit of foreclosure this defendant acted in good faith from his own personal volition and in the desire to collect from said Henrys the money justly due him on said note, as he was justly entitled to do; that this defendant in no way, shape, or form ever, either directly or indirectly, consulted with either of the said Henrys, personally, as to when or in what form he should proceed to collect the amount due him on said note; that all the several allegations of said bill in reference thereto are, in each and
34 every particular part thereof, untrue, and he therefore expressly denies the same.

This defendant, for a further answer, says that all the several allegations in said bill contained respecting the object this defendant had in the foreclosure of said mortgage, the purpose for which the same was done, the manner in which said proceedings for the said foreclosure were conducted so far as they relate to or affect this defendant, are entirely false and untrue; that so far as they relate to or in any way or manner affect the procedure of the solicitor of this defendant therein this defendant is informed and verily believes the said bill is wholly untrue, and he, this defendant, expressly denies the same in toto.

And further answering, this defendant says that he admits that the said Henrys made no defence to said foreclosure suit, but that they were all duly served with a subpœna that the reason they, the said Henrys, made no defence, was not by any collusion or agreement with the said Bender, but for the simple reason that they had no defence to make to said bill; that, as this defendant is informed and believes true, the said Charles A. Henry had employed two attorneys
35 for the purpose of making a defence, if any could be made,

and that upon consultation it was determined that no defence could be made to the claim set out in the said complainant's, Bender's, bill of complaint.

And this defendant further saith that instead of said Henrys, or either of them, desiring this defendant to commence said suit of foreclosure or making any arrangements in reference thereto by which the creditors of said Henrys were to be in any way defrauded as charged in said bill, the said Charles A. Henry desired this defendant, through his agent and attorney, to prolong the day of the commencement thereof to as late a period as possible, and stove off the commencement thereof as long as possible.

This defendant, further answering, says that he is informed by a reference to the files in said foreclosure suit that the said Charles A. Henry did consent in writing to the confirmation of said sale, but this defendant had no knowledge or information of such consent having been given until he saw the fact thereof charged in the complainant's bill herein. But this defendant says that such consent was of no avail to this defendant, for the reason that he was well entitled
36 to have said sale confirmed at the time thereof, said sale having been in all respects legally made; and this defendant expressly denies that he, either directly or indirectly, in any way, shape, or manner, made any contract or agreement or had any understanding that said Henrys, or either of them, were to be in any way benefited by the giving of said consent, and that all the several allegations in said bill contained charging any such agreement or understanding on the part of this defendant are untrue, and he denies the same expressly; and this defendant also denies that he ever made any "express or implied agreement," with said Henry or any one else, whereby this defendant would formally bid in said mortgaged property and hold the same as in said bill charged; and this defendant says that all the several allegations in said bill contained concerning an agreement or understanding on the part of this defendant with said Henrys, or any other person, either directly or indirectly, whereby this defendant was to hold said mortgaged premises for the use of said Henrys, either in whole or in part, or whereby this defendant should redeed a part of said premises to said Henry upon any terms or condition
37 whatsoever, are utterly and merely untrue, and this defendant therefore expressly denies the same.

And this defendant, further answering, says that said sale was duly made, that due and legal notice thereof was given, and this defendant by no act, either directly or indirectly, induced any one not to bi upon the property, if he had desired so to do; that this defendant w not present at the sale aforesaid except by his solicitor in said suit, James M. Woolworth, esq., who, as this defendant is informed and believes true, did nothing in any way to compromise the legal and equitable rights of this defendant, but in all things, so far as he was concerned, conducted said sale honestly and legally.

And for a further answer this defendant saith that in so far as this defendant is charged in said bill with any contracts, understandings, agreement, conduct, or anything else, with or to said Henrys, or either

of them, at, before, or since the making of said sale, which in any way, shape, or manner affects the same, or was in any way intended to affect the same, or in any manner benefiting the said Henrys, or either of them, the prejudice of the rights of the said complainants, or either of them, the said bill is untrue; and he therefore expressly denies the same.

38 And for a further answer this defendant says that it is absolutely untrue, and he therefore expressly denies, that "the said judgment of foreclosure was obtained by collusion and fraud by the said Henrys and this defendant as against the said complainants," as in said bill it is alleged, and he also expressly denies that the profits and rents arising from the use of said premises, from rents or otherwise, "have been more than sufficient to refund to said Bender the actual amount of money advanced upon said premises and interest," said allegations being wholly untrue.

And for a further answer this defendant saith that it is wholly untrue as in said bill charged "that said Anan Henry was never served with process of subpœna in said foreclosure suit as by law required," and he therefore expressly denies said allegation; and he further saith that said Anan Henry was duly served with subpœna and had due and legal notice of the commencement of said suit as the law provides shall be given in such cases; that all the allegations in said bill contained as to the non-service of process upon the said defendants or either of them are untrue, and he therefore expressly denies the same.

39 And for a further answer this defendant saith that he is informed and believes it to be true that at the date of said confirmation of the said sale the legal title (subject to the said mortgage of this defendant) was in said Charles A. Henry, and that said Anan Henry had no interest therein, neither did said Abigal S. Henry or said Lydia Henry have any interest therein; and he also says that it is wholly untrue and he denies "that said Charles A. Henry entered the consent of said Anan to said confirmation without any authority whatever from said Anan or any knowledge on his part, all of which said Bender well knew, but entered the consent under the agreement and express understanding hereinbefore mentioned," as in said bill it is alleged; and this defendant further says that it is wholly untrue as in said bill charged, that said Charles A. Henry was not the agent of said Anan Henry to consent to said confirmation of sale, but did so on his own account and for his own interest without the knowledge or consent of the said Anan Henry. And he therefore expressly denies the same, and alleges the contrary thereof to be true.

And for a further answer this defendant says that, as he is informed and verily believes true, the said Charles A. Henry was at the

40 time of entering the said consent to said confirmation a member of the bar, and that the allegation in said bill that he was not at that time a member of the bar is wholly untrue, and he therefore denies the same.

And for a further answer this defendant saith that he admits that he "has had the possession and control of said premises," as he was

well entitled to have, since about the time charged in said bill, and that, to the extent that he has been able, he has rented them as his own or such parts thereof as he could rent; and that he has received the rent money arising therefrom and has appropriated the same to his own use, except such portions thereof as he has necessarily expended in repairs upon the buildings. He also admits that he now does, and at all times heretofore, ever since said confirmation has used said premises as his own; that he neither recognizes any rights to said premises as against himself, either in said complainants or either of them, nor in said Henrys or either of them. He also refuses to recognize the said judgments, if any there are, as in any manner liens upon said premises, to the prejudice of the rights of this defendant under his aforesaid mortgage.

And further answering this defendant saith that he denies that he is "the fraudulent trustee of the creditors of the said Charles
41 A. and Anan Henry" as in said *said* bill the said complainants have charged that he never had anything whatever to do with the said complainants or any of the creditors of the said Henrys, or either of them, to his knowledge.

And for further answer this defendant says that he loaned to said Henry, on the security of said mortgage, the sum of three thousand dollars in cash, good and lawful money, at the urgent solicitation of said Henry, for which said Henry agreed to pay to this defendant interest at the rate of three per cent. per month, which was below the rate of interest usually charged and given at that time in said Territory, to be paid in one year from the time of said loan; that said note was given as the evidence of said agreement; that said note was given for the amount of the money actually loaned and including the interest as aforesaid for one year, payable one year from the date thereof, with interest after maturity at the rate of three per cent. per month; that the sum of three thousand dollars paid by this defendant, together with one year's interest thereon, at three per cent. per month, constituted the actual consideration of said note, which said mortgage was given by said Henry to secure; that in the making of said loan this defendant acted through and by an agent who
42 then resided in said city of Omaha; this defendant, then and now residing in the city of Albany, New York, that David H. Moffat acted as the agent of this defendant, and it was through him that said Henrys solicited and obtained said loan; that to the knowledge of this defendant there was no understanding as to the rights of said Henrys in said transaction, except as contained in said note and mortgage. This defendant in good faith let said Henry have the money aforesaid on the security of said premises, which by said Moffat were represented to be ample; that there was no understanding or agreement outside of or in any way, shape, or manner infringing or affecting said note and mortgage; that there was no agreement or understanding on the part of this defendant, or any person by him authorized, in regard to the right of said Henry to redeem said premises at any time after the sale in consideration of his entering his consent and the consent of others to said confirmation.

And this defendant expressly denies that he ever, either directly or indirectly, had any knowledge, information, or belief that said complainants, or either of them, at any time had or pretended to have liens upon said premises, nor have they in fact any liens thereon, 43 nor did they, as this defendant believes, ever suppose they had any liens thereon until long after said confirmation of said sale, nor until, as this defendant believes, in furtherance of a conspiracy and fraudulent combination entered into between Chas. A. Henry and others, and by inducements of profit or gain held out to them by said Henry, they were induced to lend the use of their respective names to said Henry in the institution of this proceeding, whereby said Charles A. Henry and his confederates hoped in some way, either by vexatious litigation or in some other way, to induce this defendant to pay off said pretended claims; that until about the time of the commencement of this suit, if the said complainants were, as charged in said bill, the creditors of said Henrys, they never relied or even pretended to have any liens for the payment thereof upon said premises, but wholly relied upon the pecuniary responsibility of said Henrys alone for the payment thereof.

And for a further answer this respondent says that he denies that said Henrys are insolvent, and this defendant further says that all the several allegations in said bill contained which are not expressly and in terms admitted to be true are absolutely untrue, and he 44 expressly denies the same; and this defendant denies all and all manner of combination or confederacy wherewith he is in said bill charged, without this, that there is any other matter, cause, or thing in the complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant.

Wherefore this defendant prays to be hence dismissed, and be allowed his reasonable costs and charges in this behalf most wrongfully sustained.

EPHRAIM H. BENDER,
By GEO. B. LAKE, *his Solicitor.*

THE TERRITORY OF NEBRASKA, *County of Douglas, ss:*

Geo. B. Lake, being first duly sworn, on his oath doth depose and say that he is the attorney for the said defendant in the foregoing answer, who is a non-resident of and now absent from said Territory; that he knows the contents of the foregoing answer, and the same is true, except as to those matters and things therein stated on information and belief, and as to those matters he believes it to be true; and further saith not.

GEO. B. LAKE.

Subscribed in my presence and sworn to before me this 29 day of December, A. D. 1862.

J. H. KELLOG, *Clerk.*

45 And thereupon afterwards, to wit, on the 7th day of January, A. D. 1862, there was filed in the office of the clerk and register of said court the replication of the complainants in this cause to the answer aforesaid, which said replication was in the words and figures following, to wit:

Replication of all of said complainants to the answer of said defendant Bender.

In district court, Douglas county, in chancery.

ASA HUNT *et al.*, complainants,
vs.
EPHRAIM H. BENDER *et al.*, defendants.

These repliants, saving and reserving to themselves now and at all times hereafter all manner of benefit and advantage of exception which may be had or taken to the manifest insufficiencies of said answer, for replication thereto say they will aver, maintain, and prove their bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that said answer of said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatever in said answer contained material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and
46 things these repliants are and will be ready to aver, maintain, and prove as this hon. court shall direct; and humbly pray as in and by said bill they have already prayed.

REDICK & BRIGGS,
Solicitors for Complainants.

And thereupon afterwards, to wit, on the 25th day of September, A. D. 1863, were filed in the clerk's office the interrogatories and notice thereof, which are in the words and figures following, to wit:

In the district court for the first judicial district Nebraska within and for the county of Douglas, in chancery.

ASA HUNT *et als.*, complainants,
vs.
EPHRAIM H. BENDER *et als.*, def'ts.

Interrogatories to be propounded to Ephraim H. Bender, the said defendant, of the city of Albany, in the State of New York, on an examination of the said Bender as a witness before Solomon F. Higgins, esq'r, of said city of Albany, commissioner.

1st interrogatory. What is your name, age, place of residence, occupation, and your relation to the above-entitled suit?

47 2d interrogatory. Are you acquainted with the complainants in this case, viz: Asa Hunt, Franklin A. Eaton, Joseph P. Maning, George Armstrong, and Asa Hunt, or either of them? If

so, when you became acquainted with them or such of them as you do know.

3d interrogatory. Are you personally acquainted with Chas. A. Henry and Anan Henry, his father, two of the defendants in this case? If so, state at what time you became acquainted with them or either of them.

4th interrogatory. State whether you ever loaned any money to said Charles A. Henry or Anan Henry? If so, state when, what amount and kind, and what security, if any, you took for the payment of the money so loaned; also for what purpose the money was loaned.

5th interrogatory. State fully the particular circumstances of the making of said loan, if one was made, through whom application for the loan was made, where you resided at that time, and where did said Henry reside, and through whom did you transact the business.

48 6th interrogatory. If, in answer to the fourth interrogatory, you state that you loaned a sum of money to said Anan Henry and received therefor his note secured by mortgage upon the west forty-four feet of lot seven in block one hundred and twenty-two (122) in the city of Omaha, Nebraska Territory, then please state further what consideration passed from you to said Henry for said note and mortgage, and in what particular manner did you pay it. State fully.

7th interrogatory. Did you ever have any personal interview or correspondence with either Anan Henry or Charles A. Henry, his son, respecting in any way or manner the said note or mortgage, or in regard to the foreclosure of said mortgage? If so, state the same fully.

8th interrogatory. Did you foreclose said mortgage? If so, who was your attorney for that purpose? State also whether you ever made any agreement or had any understanding with said Anan Henry or any other person whereby Chas. A. Henry or Anan Henry was to derive any benefit by consenting to a confirmation of the sale made in said foreclosure suit. State fully.

9th interrogatory. Will you now state whether or not you
49 ever had any knowledge, information, or belief that said complainants Hunt, Eaton, Armstrong, and Manning, or either of them, had or claimed to have prior to the commencement of this suit any lien or claim against said premises on which you held said mortgage. State fully.

10th interrogatory. If you know any other facts or circumstances that may be of interest in the just determination of this case, state the same fully and as particularly as if you were interrogated with especial reference thereto.

GEO. B. LAKE,
Solicitor for the Defendant Bender.

Interrogatories to be propounded to Samuel Moffit, of the city of Albany aforesaid, a witness to be produced and examined on the part of the said defendant, Bender, at the time and place and before the said commissioner, Solomon F. Higgins.

1st interrogatory. State your age, occupation, place of residence, and whether you are acquainted with the parties to this suit. If so, please state when and where you first became acquainted with them, or such of them as you do know.

50 2d interrogatory. State whether you ever resided in the city of Omaha, Nebraska. If so, at what time and how long; also in what business were you engaged while you resided there?

3d interrogatory. State whether or not you have any knowledge of your own respecting a loan of money being made by Ephraim H. Bender, one of the defendants in this suit. If so, state fully all you know about it, as to when said loan was made; what security was given; the rate of interest to be paid; and what kind of money said Bender let him have; and how the same was remitted by said Bender to said Henry; and if you had anything to do in or about the making of said loan, and taking the security for the same, state it fully and particularly.

4th interrogatory. If you know, state how and by whom the application was made to said Bender for said loan; also what sum was loaned, and on what rate of interest, and for what purpose.

51 5th interrogatory. If, in answer to the last interrogatory, you state that you made the application to said Bender for said loan, will you state further, at whose request did you make the application, and for and on behalf did you act in the transaction. State fully.

6th interrogatory. Did said Bender make any requirements or exact any conditions respecting the security for the payment of the money which he so loaned, while negotiating in reference thereto? State fully.

7th interrogatory. Had either you or said Bender any knowledge or information that said complainants had, or ever pretended to have any liens or claims against the property which Henry so mortgaged to said Bender. State fully.

8th interrogatory. Did you or said Bender make, or cause to be made, any examination of the title to said property so mortgaged? If so, state fully what examination was made and for what purpose.

9th interrogatory. By and through whom did Anan Henry act in the preliminary part or arrangements of said loan?

52 10th interrogatory. From whom did the proposition for the loan come, from said Henry or said Bender?

11th interrogatory. If it be a fact that said Henry received any Omaha city scrip, so called, on said loan, please state fully and particularly concerning the same, whether said Bender was in any way a party thereto, and how it came about that said scrip entered into said transaction, if it did. State fully.

12th interrogatory. Do you know, if so state, what was the current value of said Omaha city scrip at that time, in the market, and

what place did it then occupy in commercial and business transactions among the bankers and business men of said Omaha city.

13th. In what business were said Henrys engaged during the time of the making of said loan, and where or with whom did they keep their cash accounts or money deposits?

53 14th interrogatory. If you know anything that may relate to or be of benefit to the said defendant, Ephraim H. Bender, please state the same fully and as particularly as if interrogated with especial reference thereto.

GEO. B. LAKE,
Solicitor for said Bender, one of the Def'ts.

In the district court first judicial district of the Territory of Nebraska, within and for the county of Douglas, in chancery.

ASA HUNT *et als.*
vs.
EPHRAIM H. BENDER *et als.*

To Messrs. Redick & Briggs, solicitors for complainants:

GENTS: Take notice that on the (sixth) 6th day of October, A. D. 1863, a commission will be sued out of the office of the register of the aforesaid court, directed to one Solomon F. Higgins, esq., of the city of Albany, in the State of New York, authorizing him, the said Higgins, to take the testimony of the said defendant, Ephraim H. Bender, and one Samuel Moffat, of the city of Albany aforesaid, to be used and read in evidence on the hearing of this case, and that in-

54 terrogatories are now on file in said register's office, which will accompany said commission and be propounded to said witnesses.

You can file cross-interrogatories, if you desire, and name a commissioner, or said commission will issue ex parte.

Sept. 25th, 1863. GEO. B. LAKE,
Sol. for said Bender.

Received a copy of this notice the 25th day of September, A. D. 1863.

REDICK & BRIGGS,
Solicitor for Complainants.

And thereupon afterwards, to wit, on the 6th day of October, in the year aforesaid, a commission to take depositions was issued from the clerk's office, which is in words and figures following, to wit:

The district court of the first judicial district of the Territory of Nebraska, within and for the county of Douglas, in chancery.

To Solomon F. Higgins, esq'r, of Albany, N. Y., greeting:

Know you that we, having full faith in your prudence and competency, have appointed you commissioner, and by these pres-

55 ents do authorize and require you to examine upon interrogatories annexed to this commission, Ephraim H. Bender, of Albany, New York, in a certain cause pending in this court, wherein

Asa Hunt *et al.* are complainants, and Ephraim H. Bender *et al.* are defendants, on oath, to be by you administered, to take and certify the depositions of the said witnesses, and return the same, in accordance with the statute in such case made and provided.

Witness the Hon. Wm. P. Kellogg, judge of the district court of first judicial district, at the city of Omaha, on the 6th day of October, A. D. 1863.

[SEAL.] JOHN H. KELLOM, *Clerk and Reg'r*,
By H. M. DICKINSON, *Dept. C'lk.*

And thereupon, afterwards, to wit, on the 27th day of October in the year aforesaid, the depositions of Samuel Moffat and Ephraim H. Bender were filed in the clerk's office, which are in words and figures following, to wit:

By virtue of and in pursuance of the commission issued out of the district court of the first judicial district of the Territory of
56 Nebraska, in a certain cause wherein Asa Hunt *et al.* are complainants, and Ephraim H. Bender *et al.* are defendants, and of the interrogatories thereto attached, all of which are hereto annexed, Samuel Moffat, a witness in said commission mentioned, appeared before me at the city of Albany, and State of New York, on the 17th day of October, 1863, and in answer to the said several interrogatories duly and severally propounded to him, annexed to said commission, after being duly sworn by me, in said action, said Samuel Moffat testified and gave evidence, in response to said interrogatories, as follows:

Answers to interrogatories:

1st interrog. I am forty-two years of age; I reside in the city and county of Albany and State of New York; I am a banker; I became acquainted with the parties complainant in this suit, at Omaha city, some time in the years 1856 and 1857. I had, however, no no intimate acquaintance with any of the said parties, except C. A. Henery. I became acquainted with the defendant Bender at Albany, in the year 1849.

57 2d. I went to Omaha city to reside, in the spring of 1856, and continued to reside there until late in the year 1857; I was during that time cashier of the Bank of Nebraska.

3d. I know that a loan was made by the defendant Bender to the complainant Anan Henry in the year 1857. I applied to said Bender for a loan of three thousand dollars for Anan Henry. Mr. Bender consented to loan the money, and I made drafts on him accordingly for three thousand dollars, which were paid; these drafts, to the best of my recollection, were made in August, 1857, and before the 15th of the month, and were paid at Albany, in the State of New York, and I paid the said sum of three thousand dollars to Anan Henry, in current funds in the Territory. The security given by Anan Henry for the loan was a note for the sum of four thousand and eighty dollars payable in one year from its date. The rate of interest, on the loan of $3,000, was three per cent. per month, which

was computed for 12 months, and the amount thereof added to the sum of three thousand dollars, which made the said amount
58 of four thousand and eighty dollars, the amount for which the note was given, and as security for the payment of the note, a mortgage was executed by Anan Henry and wife to Ephraim H. Bender, and the west forty-four feet of lot seven, in block one hundred and twenty-two, in the city of Omaha, Nebraska Territory, the consideration of the mortgage was the same amount of the said note, four thousand and eighty dollars. The note and mortgage were dated the fifteenth day of August, 1857, and were *were* payable in one year from date. I negotiated this loan for Mr. Anan Henry; made drafts on Mr. Bender for the amount of the loan, and procured the said note and mortgage, and sent them to Mr. Bender at Albany, N. Y.

4th. The application for said loan was made through me to Mr. Bender, on behalf of Anan Henry. The sum loaned was three thousand dollars, and the rate of interest three per cent. per month.

5th. I made the application for the loan to Mr. Bender, at the request of Charles A. Henry, acting for his father, Anan Henry.

6th. The conditions and requirements, made by said Ben-
59 der, respecting the loan, were that the property was to be free and clear of incumbrance at the time of the giving of the mortgage and note, and that the rate of interest, on said loan, was to be three per cent. per month.

7th. At the time of the giving of the said note and mortgage I had no knowledge or information that said complainants had, or ever pretended to have, any liens or claims against the property, which said Henry so mortgaged to said Bender.

8th. I went to the recorder's office of Omaha city, and with the assistance of the person in charge of the office, and made an examination of the records of the office for the purpose of ascertaining if the said property, mortgaged by the said Henry to Bender was free and clear of all incumbrances.

9th. Anan Henry acted through his son Charles A. Henry, in the preliminary part or arrangement of said loan.

10th. The proposition for said loan came from said Henry.

60 11th. If said Henry received any Omaha scrip, so called, on said loan, Mr. Bender was not a party thereto, but the same was paid to said Henry as funds then current in Omaha city.

12th. At that time the current value Omaha city scrip, in the market, was par with other currency; and it occupied, in the commercial and business transactions among the bankers and business men of Omaha city, the same place with other current funds there in use in the Territory of Nebraska.

13th. I don't remember what particular business the said Henrys were engaged in at that time. I think he was in some mercantile business, and kept a cash account in the Bank of Nebraska.

SAMUEL MOFFAT.

Whereupon said Moffat subscribed his name to said answers as above appears.

SOLOMON F. HIGGINS, *Commissioner.*

By virtue of and in pursuance of the commission issued out of the district court of the first judicial district of the Territory of Nebraska, in a certain cause wherein Asa Hunt *et al.* are complainants,
61 and Ephraim H. Bender *et als.* are defendants, and of the interrogatories thereto attached, all of which are hereto annexed, Ephraim H. Bender, the defendant in said action, appeared before me at the city of Albany, in the county of Albany, in the State of New York, on the 17th day of October, 1863, and in answer to the said several interrogatories duly and severally propounded to him, annexed to said commission, after being duly sworn by me in said action, said Bender testified and gave evidence in response to said interrogatories, as follows:

1st interrog. My name is Ephraim H. Bender; I am forty-three years of age; I reside in the city and county of Albany and State of New York; I am a book-seller and stationer; I am the defendant in the above-entitled suit.

2d. I am not, nor ever was, acquainted with either of the complainants named in this case in the 2d interrogatory.

3d. I saw Charles Henry once, some time in the latter part of the summer of the fall of 1858, (as near as I can remember,) and had
62 an interview with him; that is all the acquaintance I have with him. I have no acquaintance with the other complainant, Anan Henry, named in the 3d interrogatory.

4th. In the summer of 1857, I loaned three thousand dollars to Anan Henry by sight drafts drawn by Samuel Moffatt on me, payable in New York, and which were sent from New York to the city of Albany for collection, and were paid by me in current funds, and received as security for the payment of the same the note of Anan Henry and a mortgage on the west forty-four part of lot seven, in block one hundred twenty-two (122,) in the city of Omaha, Nebraska Territory. The money was loaned by me for the purpose of an investment for one year.

5th. Mr. Samuel Moffat, then of Omaha city, some time in the early part of 1857, applied to me for a loan of three thousand dollars for Anan Henry. I loaned the money, and in consideration therefor I received the note of Anan Henry for the sum of four thousand and eighty dollars, dated August 15th, 1857, payable in one year, at the Nebraska Bank, Omaha city, and for further security a
63 mortgage was made by Anan Henry and wife for the same amount as the note, and bearing date the day of the date of the note. The payment of said note was to be made promptly at its maturity. I at that time resided in the city of Albany and State of New York, and Anan Henry resided in Omaha city, Nebraska Territory. The application for the loan was made to me through Samuel Moffat, then of Omaha city, and the business was transacted through him, Samuel Moffat. The rate of interest was agreed upon at the rate of three per cent. per month, and was computed for one year or 12 months, and the amount added to the three thousand dollars, which made up the sum of four thousand and eighty dollars, the amount for which the note and mortgage were given.

6th. The consideration which passed from me to Anan Henry, for said note and mortgage, was the sum of three thousand dollars paid by me on drafts drawn on me by Samuel Moffat, payable in New York city.

7th. I never had any correspondence with either Anan Henry or Charles A. Henry, his son, respecting the said note and mortgage. I did have one personal interview with Charles A. Henry at Albany, in the latter part of the summer or fall of 1858, (as near as I
64 can remember,) respecting the note and mortgage; at which interview said Charles A. Henry asked me to extend the time of the payment of the note and mortgage. I told him I could not extend the time, as the loan was made for but one year, and that I fully expected that it would be paid at the end of that time, and that if it was not so paid I should have to foreclose the mortgage. He still urged me to extend the time, and I firmly declined to do so.

8th. I did foreclose said mortgage. James M. Woolworth was my attorney. My directions to him were to foreclose the mortgage immediately, and with as little delay as possible. I never made any agreement or had any understanding whatever with Anan Henry or with any other person, whereby said Charles A. Henry or Anan Henry was to derive any benefit by consenting to a confirmation of the sale made in said foreclosure suit.

9th. I never had any knowledge, information, or belief that said complainants, Hunt, Eaton, Armstrong, and Manning, or either o them, had or claimed to have, prior to the commencement of this suit, any lien or claim against said premises on which I hold said
65 mortgage. I always understood and firmly believed that said premises, at the date of said mortgage, was entirely free and clear of all liens and incumbrances of every kind and nature.

EPHRAIM H. BENDER.

Whereupon said Bender subscribed his name to said answers as above appears.

SOLOMON F. HIGGINS, *Commissioner.*

And thereupon, to wit, on the same day and year aforesaid, was filed in the clerk's office, the deposition of John B. Chambers, which is in words and figures following, to wit:

Deposition of a witness, taken at the office of Redick & Briggs, in the city of Omaha, Nebraska, in a cause pending in the district court for Douglas county, in chancery, wherein Asa Hunt *et als.* are complainants, and Ephraim H. Bender *et al.* are defendants.

Present: Redick & Briggs for complainants, and Geo. B. Lake for defendant Bender.

Deposition taken, by consent of parties, this 24th day of October, 1863.

John B. Chambers, a witness produced and sworn on behalf of the complaimants, deposes as follows, to wit:

66 Question. What is your name, age, and place of residence, and how long have you resided there?

Answer. John B. Chambers; my age is 44; place of residence, Omaha, Nebraska, where I have resided since May 11th, 1857.

Question. Are you acquainted with Charles A. Henry and Anan Henry, his father; and with the west 44 feet of lot 7, in block 122, in Omaha? and if so, how long have you been acquainted with them respectively?

Answer. I am acquainted with the Henrys; have known them a little over six years; have also known the lot since the spring of 1857.

Ques. Are you acquainted with F. H. Eaton, and how long have you known him?

Ans. I am; for about 20 years past.

Quest. State what you know, if anything, in regard to a contract being made between said Henrys and said Eaton, relative to furnishing brick for the erection of the buildings standing on the west 44 feet of said lot known as Henry's block; and if so, when was
67 that contract made, and about what were its terms?

Ans. The only definite point I can recollect relative to the contract, is about the last of June, 1857, C. A. Henry and some other person came down to the brick-yard where I was at work, and Henry said he had made a contract with my partner to furnish him a hundred thousand brick.

Were those brick delivered to him as per contract?

They were.

In what building were they used?

They were used in the west building on said lot, now occupied by Mr. Huntington.

What was he to pay Eaton per thousand?

Ten dollars per thousand.

What other materials, if any, did Mr. Eaton furnish towards the erection of that building?

He furnished 26 thousand five hundred brick more than the contract, and also a lot of tarred canvas for the roof of the building, the price of which I cannot state positively.

At what time was that building, for which these materials were furnished, commenced; that is the brick work, and during what months was it completed?

The first brick were delivered on the 20th July, 1857, and
68 the last on the first day of October, in the same year. The brick were all delivered between those two dates.

State what the consideration was, upon which judgment was obtained by F. H. Eaton against C. A. Henry and Anan Henry, which is mentioned in the bill of complaint in this cause.

The judgment was obtained for the brick and roofing material furnished as above stated, to the best of my recollection.

When did Mr. Eaton first learn, or you as his partner in the brick business, that the Henrys had executed a mortgage to the defendant in this suit, Ephraim H. Bender?

I cannot state positively, but it was some time in the winter of 1857 or spring of 1858.

State as near as you can the aggregate sum of brick and materials furnished by F. H. Eaton for the erection of that building.

He furnished a hundred and twenty-six thousand brick, at $10 per thousand.

Cross-examination:

What is your relation to this suit?

I have no interest in this suit whatever. I was partner of F. H. Eaton in the brick business, but have no interest in the matter now.

JOHN B. CHAMBERS.

69 Subscribed in my presence and sworn to before me this 24th day of October, A. D. 1863.

[SEAL.] BYRON REED, *Notary Public.*

[U. S. R. S., 5 c.]

TERRITORY OF NEBRASKA, *Douglas county, ss:*

I, Byron Reed, a notary public in and for said county, do hereby certify that John B. Chambers was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth, in the said cause pending in the district court in chancery of Douglas county, Nebraska, wherein Asa Hunt *et als.* are complainants, and Ephraim H. Bender *et als.* are defendants; that the said examination was had in my presence, and the said deposition of said witness was reduced to writing by myself and was subscribed by said witness in my presence, and that said deposition was taken and subscribed by said witness at the time and place mentioned (by consent of the parties) in the caption to the same.

In testimony whereof, I have hereunto set my hand and official seal this 24th day of October, 1863.

[SEAL.] BYRON REED, *Notary Public.*

[U. S. r. s., 5 c.]

70 And thereupon afterwards, to wit, on the 12th day of November, A. D. 1863, was filed in the clerk's office the deposition of George Armstrong and C. A. Henry, which is in words and figures following, to wit:

Depositions of witnesses taken to be used in an action pending in the district court for the county of Douglas and Territory of Nebraska in chancery, wherein Asa Hunt *et al.* are complainants, and Ephraim H. Bender *et als.* are defendants, by consent and agreement of parties, and without notice, at the office of Redick & Briggs, in Omaha, in said county of Douglas, on the 6th day of November, 1863, the said complainant appearing by Redick & Briggs, their solicitors, and the defendants by Geo. B. Lake, esq'r, their solicitor.

George Armstrong, a witness produced, being first duly sworn, and being examined on the part of the complainants, says:

1 ques. State your age and place of residence, and how long you have there resided.

Ans. I am 44, and reside in Omaha, Douglas county, Nebraska, and have been a resident of Omaha eight years and over.

2 ques. Are you one of the complainants in this suit, and
71 if you should answer yea, will state what the consideration was upon which you obtained the judgment described in the bill?

(Objected to by def't Bender as immaterial.)

Ans. I am one of the complainants; I think it was for materials furnished and work done on the west 44 feet of the pioneer block standing on the west forty-four feet of block 7 in lot 122.

3 ques. About when did that debt accrue upon which you obtained that judgment?

(Question objected to by def't Bender as immaterial.)

Ans. I cannot tell exactly, not having my books to refresh my memory, but I think the work was done in the summer of 1856 or the fore part of 1857.

4 ques. State what you know of the erection of the brick building standing upon the west 22 feet of said lot, when it was commenced.

(Objected to by def't Bender as immaterial.)

Ans. I don't remember when it was commenced, but I saw the work going on, I think in the summer of 1857, and Asa Hunt and J. P. Manning, were the builders.

5 ques. State who was to work on that building in the months of July and August, 1857.

(Objected to by def't Bender as immaterial.)

Ans. Hunt & Manning were the only builders that I knew to be engaged in it. I am not certain to the month, but it was in the summer of 1857.

72 6 ques. Were you familiar with the value of property in Omaha about the month of August, 1857?

Ans. I was.

7 ques. Will you state what was the value of that property, the west 44 feet of lot 7 in block 122, in Omaha?

(Objected to by def't Bender as immaterial.)

Ans. I should say in the neighborhood of fifteen or twenty thousand dollars.

8 ques. Were you familiar with the value of property in the city of Omaha in the year of 1859? And what was the value of the same property during that year?

(Objected to by def't Bender as immaterial.)

Ans. I was somewhat acquainted with the value of property in Omaha in 1859. I remember that property had depreciated very much; I think the property referred to was worth from ten to fifteen thousand dollars.

9 ques. What would those premises throughout rent for during the fall and winter of the year 1859, per annum?

(Objected to by def't Bender as immaterial.)

Ans. I was not familiar with the rates of rents, but *but* I think the

property referred to would bring from one thousand to twelve hundred dollars a year.

73 10 ques. When did you first learn that the defendant Bender held a mortgage against this property?

(Objected to by def't Bender as immaterial.)

Ans. I don't remember, the first I knew of it was when I heard of the sale upon the foreclosure.

11 ques. What was the reputed pecuniary condition of the Henrys in the summer of 1857?

(Objected to by defendant Bender as immaterial, irrelevant, and not calling for the best evidence.)

Ans. They did not have the reputation of having a great amount of funds, their credit was good.

12 ques. What was their reputed condition as to solvency or insolvency during the year 1859?

(Objected to by def't Bender for same reason as preceding question.)

Ans. They were considered insolvent.

13 ques. Were you acquainted with Samuel Moffat in the year 1857? and if so, state where his place of business was, and how near it was to the west 44 feet of lot 7, in block 122, in Omaha.

(Objected to by def't Bender as immaterial and irrelevant.)

Ans. I was acquainted with him; he was cashier of the bank of Nebraska, located on the opposite side of the street from the premises in question, and about a half a block further west; that was his place of business during the summer of 1857 and up to the time he left.

Cross-examined by def't Bender:

74 14 ques. At what time was that part of the block standing on the middle 22 feet of lot 7 in block 122, before referred to constructed?

Ans. I think it was in 1856.

15 ques. At what time was that part of the block standing on the west 22 feet of the same lot constructed?

Ans. I think in 1857.

GEORGE ARMSTRONG.

Charles A. Henry, a witness produced, being first duly sworn, and being examined on the part of the complainant, says:

16 ques. Are you acquainted with the parties to this suit?

Ans. I am.

17 ques. Do you know anything in regard to a mortgage made by your father, Anan Henry, and his wife, in the year 1857, August 15th of that year, to said Bender? and if so, what was the consideration of that mortgage?

Ans. I know there was such a mortgage made. The consideration was to be three thousand dollars in money.

(The above question and answer objected to by def't Bender, on the ground of irrelevancy and immateriality.)

18 ques. Did Anan Henry ever get the consideration of that mortgage or any portion of it.

(Objected to by def't Bender as irrelevant and immaterial.)

Ans. The money was paid to me by Samuel Moffat, the agent of Bender; there was none of it paid to Owen Henry to my knowledge.

75 19 ques. State the circumstances of receiving that money, if money it was, and all about it; what kind of money you received, if any.

(Objected to by def't Bender as irrelevant and immaterial.)

Ans. The payments were made to me by Moffat at different times, at a period from two to three months after the mortgage was made. I drew checks on Moffat for money in favor of parties who were engaged on the building and for my private purposes; the payments were made in Omaha city scrip, at least as far as those that I received was concerned.

Ques. How much good money, if any, did you receive from Moffat?

(Objected to by def't Bender as irrelevant and immaterial.)

Ans. All the payments were made to me in Omaha city scrip.

Ques. What was said between you and said Moffat, if anything about paying you in Albany money or eastern currency?

(Objected to by def't Bender as immaterial, irrelevant, and leading.)

Ans. I had several conversations with Moffat in regard to the currency or the scrip, and told him I supposed that he received eastern funds from Bender, and that Mr. Hunt and other parties employed on the building objected to receiving scrip, and that I would

76 like to have eastern currency. He said he could not give it to me, the scrip was all the currency they had.

Ques. What do you know if anything about his paying you scrip with McCormick's mark on it, which he said would be redeemed.

(Objected to as immaterial, irrelevant, and as leading.)

Ans. I remember on one occasion of his giving me two hundred dollars, which had on McCormick's private work, and was a portion of that scrip which he had agreed to redeem. I took the scrip to McCormick's banking-house and presented it for redemption, and they told me that they had quit redeeming it. I took scrip that I received of him to Dr. Monell to the western exchange, and they redeemed it by giving me scrip with other parties' names to it. I did the same to William Young Brown, and they all refused to redeem.

(Defendant Bender objects to so much of the answer as gives th conversation of parties, on the ground that it is hearsay testimony,)

Ques. How long was this mortgage given before you received any money or scrip on this transaction?

(Ques. objected to as irrelevant and immaterial.)

Ans. I cannot tell exactly; from three to four weeks.

Ques. At the time this mortgage was executed, what did Moffat know, if anything in regard to the anticipated insolvency of yourself and Anan Henry?

77 (Objected to by def't Bender as immaterial and irrelevant.) Ans. He knew the situation of my affairs as well as I did; I had kept a private account with him for several months; Anan Henry was considered solvent at that time, but Moffat understood that Anan Henry's name was used as a matter of convenience in conducting the business; Moffat was my confidential adviser in business matters, and I had frequent conversations and consultations with him about the various operations.

Ques. What was said at the time the mortgage was executed, and the negotiation was going on between you and Moffat in regard to this mortgage covering the entire property? and state if any fears were expressed by him in regard to the property being ultimately held liable for mechanics' lien, judgment, &c.

(Objected to by def't as immaterial, irrelevant, and leading.)

Ans. After I first made the negotiation with Moffat for the money which was to be paid me by him, and he was to take the mortgage in his own name, he got frightened in regard to labilities which were against me, and he backed out of the transaction. I had made arrangements to build the building on his promise to loan me three thousand dollars, or more if necessary; and when he refused to advance that amount to me on a mortgage, I told him I thought

78 it was very unfair on his part to back out of the bargain, when he knew all about my liabilities, and the interest that father had in the property which stood in his name just as well when we made the bargain as when he refused to comply with it; Moffat said that he was very anxious that I should make the improvement, as a good building like that would be a benefit to him as to the town, and that he had a friend in Albany, New York, by the name of Bender, who had more money than he knew what to do with down there, where money was only worth seven per cent. a year, and that when he was in Albany the previous spring this man Bender had authorized him, Moffat, to invest on bond and mortgage on good paying property, several thousand dollars if he could get any such rates of interest as that he, Moffat, represented were being paid in Nebraska, and under that arrangement which Bender had made with him he would let me have the three thousand dollars and take a mortgage for Bender on the store already built by me, and the new one which was in process of building; I told him I did not care who I got the money from, if I got it. He said that the property was worth any

79 way after the new store was built a good deal more than I was owing, and Bender would be safe enough on both buildings; I do not remember about any specific claims being mentioned, but the conversation was in regard to the numerous liabilities against me, which were incurred in business and building the store which was already completed.

Ques. What did Moffat know, if anything, about Hunt & Manning being to work on the building at the time?

(Objected to by def't as irrelevant and immaterial.)

Ans. He knew that I was owing Hunt & Manning for plastering

the store which was erected. Hunt & Manning had just commenced the brick work on the west 22 feet of said lot.

Ques. What was the value of that property when the mortgage was given?

(Objected to as immaterial and irrelevant.)

Ans. About twelve thousand dollars.

Ques. What was the property worth when completed, and when was it completed?

(Objected to as irrelevant and immaterial.)

Ans. It was worth, I think, about twenty thousand dollars; I know it cost about twenty-four thousand; it was finished late in the fall of 1857.

80 Ques. What was the same property worth when it was sold under this mortgage?

(Objected to as irrelevant and immaterial.)

Ans. About fifteen thousand dollars.

Ques. What were the consideration of the debts that Hunt & Manning are claiming, or these judgments mentioned in the bill?

(Objected to as irrelevant and immaterial.)

Ans. The consideration was for materials furnished and work done on the buildings.

Ques. What was the rents of the building worth, and about what was the building drawing during the year 1859, and at the time you consented to the confirmation of the sale?

(Objected to as irrelevant and immaterial.)

Ans. A little over twenty-six hundred dollars was what I received that year, and the rent of the building was worth that.

Ques. Was you ever admitted as an attorney-at-law in any of the courts of the United States or this Territory?

Ans. I never have.

Ques. What right or authority had you from Anan Henry or Lydia, his wife, to consent to the confirmation of sale of said premises on the mortgage foreclosure, thereby giving Bender immediate possession of the premises?

(Objected to as immaterial and irrelevant.)

Ans. They never gave me any authority to consent to the confirmation; I had none that I know of.

81 Ques. What induced you to enter that consent?

(Objected to as immaterial and irrelevant.)

Ans. Mr. Woolworth, the attorney for Mr. Bender, agreed with me that if I would consent to the confirmation, that I should have what rents were then due from the property and what accrued until the property was sold. Mr. Eaton, through his attorney, Mr. Redick, had procured an injunction on the tenants, forbidding them to pay rent. Mr. Woolworth agreed to get the injunction removed. He said that by that arrangement we could beat Eaton.

Ques. What else was said, if anything, in regard to that operation protecting the property against other creditors? And what was said, if anything, in regard to permitting you or your father to redeem the property, or a portion of it?

(Objected to as immaterial and irrelevant.)

Ans. Mr. Woolworth said that that arrangement would give me several hundred dollars of rents, and that he would allow me to make a tender for the redemption of the property, and if that the tender would not be accepted, but it would leave the thing open for redemption thereafter.

Ques. Had this arrangement not been made, state whether or not you would have appeared and purchased at the sale, or procured some one to purchase for you?

82 (Objected to as leading, irrelevant, and immaterial.)

(Question not answered.)

Ques. What course would you have pursued had this arrangement not been made in regard to saving the property from being sacrificed?

(Objected to as immaterial and irrelevant.)

Ans. If I had had no arrangement with Woolworth in regard to the redemption of the property, I should have endeavored to have got a friend to bid the amount of the decree.

Cross-examined by def't Bender:

Ques. Will you state what claim of Eaton's was used in the suit, upon which an injunction was served upon your tenants, as referred to in your examination in chief? State also whether said claim has since been paid, and how.

Ans. That claim of Eaton's was for pine lumber, part of which was used upon these buildings; a portion of the claims, to the amount of about twenty-eight hundred dollars, according to my best recollection, was paid by Mrs. C. A. Henry transferring her house in the city of Omaha to F. H. Eaton. The balance I think, about eight hundred dollars, is still unpaid.

C. A. HENRY.

83 I, John R. Meredith, a notary public within and for the county of Douglas and Territory of Nebraska, do hereby certify that the above-named George Armstrong and Charles A. Henry, the witnesses whose names are severally subscribed to the foregoing depositions, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the case aforesaid; and that the depositions by them respectively subscribed were reduced to writing by me in the presence of the witnesses, and the said depositions were so reduced to writing and subscribed by the witnesses respectively in my presence. And that the same were taken on the 6th day of November, 1863, at the office of Redick & Briggs, in the city of Omaha, county of Douglas, and Territory of Nebraska, by consent and agreement of the counsel appearing for both parties.

In witness whereof, I have hereunto set my hand and affixed my notarial seal this 7th day of November, A. D. 1863.

[SEAL.] JOHN R. MEREDITH,
Notary Public.

Officers fees to wit:

For taking the deposition 32½ folios, 15	$4 87
Swearing 2 witnesses	50
Certificate	25
Stamp	5
	5 67

84 And thereupon afterwards, to wit, on the 13th day November, A. D. 1863, Hon. Wm. P. Kellogg, judge, an order of court was filed in the clerk's office, which is in words and figures following, to wit:

ASA HUNT *et al.*
vs.
EPHRAIM H. BENDER *et al.* } In chancery.

The said Asa Hunt, one of the complainants, having died since the filing of the bill in this cause, and it appearing that the probate court for Douglas county has duly appointed Margaret Hunt, widow of said deceased, administratrix of his estate, and that she has duly qualified and entered upon her duties as such administratrix; and it further appearing that due notice of this application has been given to the solicitor for said Bender (he being the only def't appearing in this cause:) It is therefore ordered that Margaret Hunt, administratrix, be, and she is hereby, made a complainant in this suit, and that this cause stand revived and be proceeded in the name of said Hunt, administratrix, and the other complainants.

By the court:

W. P. KELLOGG, *Judge.*

85 At a district court in chancery held for Douglas county, at the city of Omaha, on the 6th day of December, 1859.

Present, Hon. A. Hall, judge.

EPHRAIM H. BENDER
vs.
ANON HENRY and LYDIA, his wife, CHAS. H. Henry and Abigal S., his wife, Frank H. Eaton and James H. Ford, impleaded with Milton Rogers.

The report of the sale of the mortgaged premises having been filed in this cause, on motion of James M. Woolworth, solicitor for the complainants, it is ordered that the same be confirmed.

A. HALL, *Judge.*

We consent to the entry of he above order.

ANAN HENRY, and
LYDIA HENRY, and
ABIGAL HENRY,
By C. A. HENRY, *their Agent.*
JAS. H. FORD.
CHAS. A. HENRY.

And thereupon, afterwards, to wit, on the 14th day of March, A. D. 1864, depositions of Anan Henry, James G. Chapman, and E. Estabrook were filed in the clerk's office, which are in words and figures following, to wit:

Depositions.

Depositions of witnesses taken before Daniel Gantt, master in
86 chancery, at his office, in Omaha, on the 7th day of November, A. D. 1863, in a certain cause pending in the district court of Douglas county, Nebraska Territory, in chancery, wherein Asa Hunt and others, complainants, and Ephraim H. Bender and others are defendants, and taken by written consent and agreement of parties, complainants and defendant, Ephraim H. Bender

Redick & Briggs, sol. for complainant, present; Geo. B. Lake, sol. for def't; Dan. Gantt, master.

Anan Henry, a witness produced, first sworn and examined on part of complainant, says:

Int. 1. What is your age and place of residence?

Ans. My age is 63 years first day of last March, and my residence is Kearney City, N. T.

Int. 2. Are you acquainted with the defendant, Ephraim H. Bender, in this suit?

Ans. I am not.

Int. 3. What do you know, if anything, of you and your wife executing a mortgage on the west forty-four feet of lot No. seven, (7,) in block one hundred and twenty-two, (122,) in the city of Omaha, in the summer of 1857, or at any other time?

Ans. I have no remembrance of anything of the kind.

Int. 4. Did you or not receive any money of said Ephraim H. Bender, or from any one representing him in the year 1857, or at any other time?

87 Ans. I did not receive any.

Ques. Do you know anything, and if so, what, in regard to a mortgage being foreclosed against you and others in the year 1859 by this man, E. H. Bender, on the west forty-four feet of lot 7, in block 122, in Omaha?

Ans. I do not.

Int. 6. Did you or not authorize some one, and if so, who, to consent to the confirmation of a sale on the foreclosure of a mortgage given by you to said Bender in the year 1859?

Ans. I did not authorize anybody.

Cross-examined by Geo. B. Lake, solicitor for defendant Bender.

Ques. 1. Is your recollection as distinct on the subject of giving a mortgage to said Bender as it is on the subject of giving your consent to a confirmation of said sale?

Ans. Yes, sir.

Ques. 2. You are quite positive, are you not, that you never gave a mortgage to the defendant, Bender?

Ans. Yes, sir.

ANAN HENRY.

MARCH 9, 1864.

Examination of witness resumed. Redick & Briggs appear, sol's for complainant; George B. Lake appears, sol'r def't.

88 James G. Chapman, a witness produced, sworn, and examined on part of complainant, says:

1. Are you well acquainted with the handwriting of the late Judge Hall? If so, look at that paper marked Exhibit A, in another cause in the district court of Douglas county, No. 311, purporting to be a confirmation of sale in that case in chancery, and state whether that is his handwriting and signature.

(Objected to by def't as irrelevant and immaterial.)

Ans. I am acquainted with the handwriting of the late Judge Hall; I have seen him write; this paper shown to me and referred to in the question I have carefully examined, and the signature of Judge Hall to the same is not in the handwriting of the late Judge Hall, as I verily believe. I believe the signature, A. Hall, judge, to be in the handwriting of E. B. Chandler, clerk of the court at that time.

JAMES G. CHAPMAN.

Experience Estabrook, a witness produced, sworn, and examined on part of complainants:

1. Are you acquainted with the handwriting of the late Judge Hall? If so, look at the paper marked Exhibit A, in another
89 cause in the district court of Douglas county, No. 311, purporting to be a confirmation of sale in that case in chancery, and state whether that is his handwriting and signature.

(Objected to by def'ts' solicitor as irrelevant and immaterial.)

Ans. I was during his lifetime, and while he was sitting on the bench here, and while I was practicing well acquainted with his handwriting, and from my recollection of it, the signature affixed to the document in question is not his. In my opinion it is the handwriting of E. B. Chandler who was at the time clerk of the court.

2. Do you know Samuel Moffat, jr., and if so, how long have you known him, and had you any conversation with him in regard to some arrangement made between him and the Henrys, by which he got the mortgage referred to in this suit? and if so, what was said, and when, as near as you can recollect?

(Objected to by def'ts as hearsay evidence and irrelevant, immaterial.)

Ans. I did know Samuel Moffat, jr., from the time he arrived in this Territory, which, I think, was some time in the year 1856, until he left, some time late in the year 1857. Mr. Moffat, in the spring of
1857, rode with me in my carriage across the State of Iowa,
90 and I accompanied him in railway to Chicago. During the time we were together we had a conversation in regard to the Henrys, and the facilities which he had furnished and had been instrumental in furnishing for the erection of the west twenty-two feet of the Pioneer block, and in this same connexion I had a conversation in relation to the currency here; and my recollection is he informed

me that he had used scrip; that the funds used were either wholly or in part of the scrip funds of the city of Omaha.

3. From his manner and appearing delight expressed on that occasion, and from what he said, did you not understand from him that he paid it all in scrip?

(Objected to by def't as hearsay evidence, and as irrelevant, immaterial, and as leading.)

Ans. My recollection of the whole transaction is somewhat vague; too much so to be definite as to details; but the impression which he left on my mind was that he had fixed it up very much to his satisfaction, and that scrip was largely used in it.

4. What was the real value of scrip at that time?

(Objected to by def't as irrelevant and immaterial.)

Ans. In my opinion its intrinsic value was nothing.

E. ESTABROOK.

91 THE TERRITORY OF NEBRASKA, *Douglas County, ss:*

I, Daniel Gantt, master in chancery in and for said county of Douglas, do hereby certify that the foregoing named witnesses, Anan Henry, James G. Chapman, and E. Estabrook, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing depositions by them respectively subscribed were reduced to writing by me and were subscribed by said witnesses respectively in my presence, and the same were taken at my office in Omaha, at the date there stated.

Witness my hand this 9th day of March, A. D. 1864.

DAN. GANTT, *Master in Chancery.*

And thereupon afterwards, to wit, on the 6th day of April, A. D. 1864, was filed in the clerk's office a bill of revivor, which is in words and figures following, to wit:

In chancery.

To the hon. the judge of the district court for Douglas county, Nebraska:

Your petitioner, Margaret Hunt, of the said county, administratrix of the estate of Asa Hunt, deceased, respectfully repre-
92 sents. that said Asa Hunt, together with others on the day of , 1861, exhibit their bill of complaint in this court against Ephraim H. Bender *et al.*, as defendants, stating therein in substance that said complainants had before the filing of the said bill severally obtained judgment against the Henrys, def'ts, and that executions had been issued thereon, and returned wholly unsatisfied; that said complainants furnished the material and labor in the erection of one of the buildings on the premises described in the bill; that said Bender was fully advised of these facts before he took said mortgage; that said Bender only loaned to said Henrys a small amount of money, and most of that was Omaha city scrip, and illegal issue, and that said Bender took a mortgage on a very large amount, with

the fraudulent intent to defraud said complainants; that said mortgage was foreclosed by and through collusion with said Henrys and said Bender; that said property sold for about $5,000, when it was in reality worth at least $15,000; and that in consequence of said fraudulent foreclosure, the said Bender was enabled to take immediate possession of said premises, and thereby avail himself of the rents and profits thereof, amounting to a large sum annually, and also
93 alleging other matters in said bill and praying that said judgments of your orators may be declared by this honorable court to be a direct and prior lien upon said premises, and that the judgment of foreclosure be declared by this court fraudulent and void as against the creditors of the said Henrys, and especially your orators and such other and further relief in the premises as to your honor shall seem right and proper.

That said Henrys did not appear and answer said bill, and that the same was accordingly taken pro confesso as against them, but that def't Bender appeared and filed an answer to the same; that a replication was duly filed to said answer, and some portion of the proofs taken on the part of both parties, and that before any other proceedings were had in said cause, said Asa Hunt departed this life intestate.

That your petitioner, as widow of said deceased, did, soon after the death of said Hunt, apply to the probate court for said county to be appointed administratrix of his estate, and that such proceedings were had in the matter, that on the 5th day of December, 1863, your petitioner was duly appointed such administratrix; that
94 thereupon letters of administration were duly issued to her. She having first taken the oath and given the bond required by law, and that your petitioner has entered upon the discharge of her duties as such administratrix of said estate, and continued to lawfully discharge those duties, at this time having the sole authority and power in the premises.

That your petitioner is advised that said cause has become abated by the death of said Hunt, and that she is entitled to receive the same as his representative.

Your petitioner therefore prays that she may be made a complainant in said cause in the place of said Asa Hunt, and that said action and the proceedings therein may stand revived, and be in the same condition that they were before the death of said Hunt.

MARGARET HUNT.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

Margaret Hunt, being by me first duly sworn, deposes and says, that she has heard read the foregoing petition, and knows the contents thereof, and that the several matters and things therein stated are true as she verily believes.

MARGARET HUNT.

Subscribed in my presence and sworn to before me this 1st day of April, 1864.

H. M. DICKINSON, *Probate Judge.*

95 The following indorsement appears thereon:
Service and notice waived March 9, 1864.

GEO. B. LAKE,
Solicitor for E. H. Bender, Def't.

And thereupon afterwards, to wit, on the 13th day of May, 1864, were filed in the clerk's office the depositions of E. B. Chandler, Clinton Briggs, and James G. Megeath, which are in words and figures following, to wit:

Depositions of witnesses taken before me, a master in chancery in and for the county of Douglas, Nebraska Territory, at my office, in the city of Omaha, said county, on this 26th day of April, 1864, upon notice served upon the parties in pursuance of an order of the district court in chancery for Douglas county, Nebraska Territory, in a certain cause pending in said court, wherein Asa Hunt and others are complainants and Ephraim H. Bender and others are defendants.

Redick & Briggs appear, sol's for complainants.

Geo. B. Lake appears, sol. for def't E. H. Bender.

DAN. GANTT, *Master in Chancery.*

E. B. Chandler, a witness produced, examined, and sworn on part of defendant, says:

96 Int. 1. Will you state whether you have at any time, and if so, when, been clerk of the district court of the first judicial district of Nebraska?

Ans. I was clerk of the said district court of the first judicial district from the fall of 1858 to the fall of 1861.

Int. 2. State whether or not you ever signed the name of Augustus Hall to any of the decrees rendered by him in said court; and if so, by what authority?

(Objected to by complainants as immaterial and incompetent.)

Ans. I have signed the name of A. Hall, judge, on several occasions, but never without his authority for doing so. I think that on one occasion I signed several decrees out of court, which were given me in court, and to which he requested me to sign his name as judge.

Int. 3. Do you recollect whether or not you signed the name of Judge Hall to the decree in the case of Ephraim H. Bender against Anan Henry and others.

Ans. I do not recollect.

Int. 4. If it appears that said signature of A. Hall, judge, to the decree in said case is your handwriting, by whose direction, if any, did you sign the same?

(Objected to by compl'ts as immaterial, incompetent, and not the best evidence.)

Ans. By the direction of Judge Hall in court.

97 Cross-examination:

Int. 5. Did you not sign some of those decrees, trying as near as you could to imitate Judge Hall's handwriting?

Ans. I did.

E. B. CHANDLER.

Clinton Briggs, a witness produced and sworn on part of defendants, says:

Int. 1. Where did you reside during the years 1856 and 1857?

Ans. I came to Omaha city on the 19th of November, 1856, and have resided here ever since.

Int. 2. Do you know, and if so, state, what was the current market value of Omaha city scrip during the year 1857?

(Objected to by complainants as immaterial, irrelevant, and incompetent.)

Ans. I answer that I have no distinct recollection on the subject, as I handled but little money during that year; but my impression is that when the scrip was first issued, it passed from hand to hand in Omaha at or near its face value, but that soon after its issue it began rapidly to decline, and I think before the end of the year 1857 it did not pass for more than thirty or forty cents on the dollar.

Cross-examined:

Int. 3. When was it first issued?

Ans. I am unable to fix the time, and can only say that it was in the summer of 1857.

98 Int. 4. State what you know, if anything, in regard to certain prominent men, bankers, and prominent merchants, in order that they might induce people to take it about the time of its issue, agreeing to protect the issue of said city scrip, and when they passed it out to take it back and pay current funds in lieu thereof, and what you know, if anything, of each such person having a private mark on the amount put in circulation by him.

(Objected to by def't as immaterial and not proper cross-examination.)

Ans. I know that it was generally understood in this community that soon after the issuance of the scrip that several of the leading bankers and business men of this city had entered into an arrangement by which they were to put into circulation certain amounts of the city scrip, and to indicate the bills which they should severally put into circulation by certain private mark, for the purpose of enabling them to protect said scrip by redeeming it when presented to them, in current funds.

Int. 5. What do you know about that scrip being redeemed according to that agreement?

(Objected to by def't as immaterial and not proper cross-examination.)

99 Ans. My impression is that for a short time the arrangement was carried out by some of the parties to it, but, I think, soon after most, if not all, of these parties ceased to carry out the arrangement.

CLINTON BRIGGS.

James G. Megeath, a witness produced, sworn, and examined on part of defendant, says:

Int. 1. Were you a resident of the city of Omaha during the year

1857, or part thereof? If so, state at what period of time you were a resident thereof.

Ans. I came here in March, and left in May, and returned in September, and have been there ever since.

Int. 2. In what business have you been engaged since you became a citizen of Omaha?

Ans. Merchandising.

Int. 3. Have you the means of knowing, if so, please state, what was the current value in the market in this city of Omaha city scrip, from the time of its issue up to, say, the first day of December, 1857.

(Objected to by complainant as immaterial and incompetent.)

Ans. Up to the 31st day of October we bought exchange with it on New York, at ten per cent. premium, and gold at the same; in general business transactions in this city it passed at par up to 31 October, 1857, and it passed at par at after that, from the first to the middle of December.

100 Cross-examination:

Int. 4. What was that scrip worth, and would it pass at all outside the city of Omaha?

Ans. I don't know what it was worth; but it passed in neighborhoods that traded in Omaha.

Int. 5. State whether or not you were not one of the prominent merchants in this city that entered into an arrangement of some kind to redeem or give other currency in lieu of the portion of scrip that was circulated by your house.

(Objected to by def't as immaterial.)

Ans. The firm of S. H. Megeath & Co. took three or four thousand dollars of that money at ninety-five cents on the dollar, and part other money for it. It was credited up to the city and paid on the mayor's checks, I think.

Int. 6. Did S. H. Megeath & Co. agree to protect the amount of scrip circulated by their house, as did other bankers and firms at that time? Had not S. H. Megeath & Co. their private mark upon that portion circulated by them?

(Objected to by def't as immaterial.)

Ans. I think you will find the article of arrangement between the mayor of the city and the other parties among the city papers, and private mark is private property, and I shall not answer anything about that.

Int. 7. State as near as you can remember the names of different firms and bankers that were parties to that arrangement with
101 the city, and state whether or not Samuel Moffat, cashier of the bank of Nebraska, was not one of them.

(Objected to by def't as immaterial.)

Ans. I was not here at the time scrip was issued; never saw any article of agreement between any person and the mayor of the city of Omaha, but I have heard such was the fact. I don't know anything about it, but I have heard Moffat was one.

JAMES G. MEGEATH.

It is admitted here by the respective solicitors of the parties complainant and defendant, Ephraim H. Bender, that the first issue of the city scrip of Omaha was made in the month of August, 1857.

DAN. GANTT, *Master in Chancery.*

Here complainants give notice to defendant, E. H. Bender, that he will read and offer in evidence at the hearing, the several judgments, executions, thereof set forth in the bill, also the papers and files in the district court, entitled F. H. Eaton and others, being Jno. J. Redick, *against* Charles A. Henry, and others in chancery; the confirmation of sale referred to in the bill the master's report,
101½ and all the files, papers, and journal entries in the foreclosure case in said court, entitled Ephraim H. Bender *against* Anan Henry and others, and referred to in the bill.

Defendant, Bender, here gives notice to complainants that he will offer in evidence, on the hearing of this cause—the journal of this court in which this case is pending, so far as the same relates to the case of Ephraim H. Bender *against* Anan Henry and others, in the foreclosure suit referred to in the suit in this case.

DAN. GANTT, *Master.*

Proceedings offered in evidence in the foreclosure suit referred to in the suit in this case.

Subpœna in chancery.

Territory of Nebraska, to Anan Henry and Lydia Henry, his wife, Charles A. Henry, and Abigal S. Henry, his wife, James H. Ford and Milton Rogers, greeting:

We hereby command you, and each of you, that you appear
102 in our district court of the first judicial district within and for the county of Douglas, in chancery, on the 5th day of March, 1859, to answer a bill of complaint exhibited against you and Franklin H. Eaton, in our said court, by Ephraim H. Bender, complainant, and to do further and receive what our said court shall have considered in that behalf.

Witness the honorable Augustus Hall, judge of our said court, the 12th day of February, 1859.

[SEAL.]

B. P. RANKIN, *Register,*
By E. B. CHANDLER, *Dep.*
J. M. WOOLWORTH, *Solicitor.*

Sheriff's return.

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I hereby certify that I served the within subpœna upon Anan Henry, one of the defendants therein named, by delivering to him a true copy thereof on the 14th day of February, 1859, at the city of Omaha, in said county, and that the same had not been served on any of the other defendants therein named.

Dated February, 14th, 1859.

J. C. REEVES, *Sheriff,*
By R. KIMBALL, *Dept.*

103 Indorsement: District court, Douglas county, in chancery. Filed February 14th, 1859.

B. P. RANKIN, *Register*,
By CHANDLER, *Dep.*

Afterwards, to wit, on the 14th day of February, 1859, a second subpœna was issued, which was in words and figures following, to wit:

Territory of Nebraska to Lydia Henry, Charles A. Henry, Abigal S. Henry, his wife, Jas. H. Ford, and Milton Rojers, greeting:

We command you, and each of you, that you appear in our district court of the first judicial district within and for the county of Douglas, in chancery, on the 8th day of March, 1859, to answer a bill of complaint exhibited against you, and Franklin H. Eaton, and Anon Henry, in our said court by Ephraim H. Bender, complainant, and to do further and receive what our said court shall have considered in that behalf.

Witness Hon. Augustus Hall, judge of our said court, the 14th day of February, 1859.

[SEAL.]

B. P. RANKIN, *Register*,
By E. B. CHANDLER, *Dep.*
J. M. WOOLWORTH, *Solicitor.*

104 The sheriff's return indorsed on this writ is in words and figures following, to wit:

Received this writ Feb'y 14th, 1859, at 2 o'clock p. m.

J. C. REEVES, *Sheriff*,
By B. KIMBALL, *Dep.*

I hereby certify that I served the within subpœna on Lydia Henry, Charles A. Henry, Abigal S. Henry, and James H. Ford, by delivering to each of them personally a true copy thereof on the 14th day of February, 1859.

J. C. REEVES, *Sheriff*,
By R. KIMBALL, *Dep.*

Dept. fee $4 00.

Indorsement: Filed February 24th, 1859.

B. P. RANKIN, *Register*,
By E. B. CHANDLER, *Dep.*

Second subpœna.

And thereupon afterwards, to wit, on the 23d day of March, 1859, a final decree in this cause was rendered, filed, and entered, which is in words and figures following, to wit:

105 EPHRAIM H. BENDER
vs.
ANAN HENRY and LYDIA HENRY, his wife, Chas. A. Henry, and Abigal S. Henry, his wife, Jas. H. Ford, and Franklin H. Eaton, impleaded with Milton Rogers.

This cause having come on this day to be heard and was argued by J. M. Woolworth, of counsel for complainant, no one appearing for the defendants; and thereupon, in consideration thereof, it was ordered, adjudged, and decreed as follows:

There is actually due to the complainant upon the note and mortgage mentioned in the bill of complaint in this cause, the sum of four thousand nine hundred and fifty-seven $\frac{20}{100}$ dollars, and interest thereon at the rate of three per cent. per month, from the 23d day of March, 1859; that so much of the mortgaged premises mentioned in the said bill of complaint in this cause, and hereinafter described, as may be sufficient to raise the said amount so due to the complainant for principal and interest, and costs in this case, and which may be sold separately without material injury to the parties interested, be sold in parcels at public auction, by and under the direction of Alfred Sayre, one of the masters of this court, that the sale be made in the county in which the mortgaged premises are situated; that the master give public notice of the time and place of such sale according
106 to the course and practice of this court, and that the complainant, or any of the parties of this cause, may become the purchaser; that the master execute a deed to the purchaser or purchasers of the mortgaged premises on such sale, and that the master, out of the proceeds of said sale, retain his fees. disbursements, and commissions on said sale, and pay to the complainant, or his solicitor, out of said proceeds his costs of this suit to be taxed, and also the amount due aforesaid, together with interest as hereinbefore provided, or so much thereof as *as* the purchase money of the mortgaged premises will pay of the same; that the said master take receipts for the amount so paid by him, and file the same with his report of sale, and that he bring the surplus money, if any, arising from such sale into court without delay to abide the further order of this court; that the defendants and or to claim from and under them, and all persons having liens by judgment or decree upon the said mortgaged premises subsequent to the commencement of this suit, and his or their heirs or representatives, and all persons claiming under them be for ever debarred and foreclosed of all right and equity of redemption or claim of, in, or to the mortgaged premises, and every part and parcel thereof; that
107 the purchaser or purchasers of said mortgages at such sale be let into possession of such part thereof as shall be purchased by them respectively, and that any of the parties of this cause who may be in possession of the said premises, or any part thereof, which shall be sold, and any person who, since the commencement of this suit has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on the production of the master's deed for such premises.

That if the money's arising from said sale of the whole of said premises shall be insufficient to pay the amount due as aforesaid, with interest, costs, and expenses of sale as aforesaid, that the master specify the amount of such deficiency in his report of sale, and that on the coming in and the confirmation of said report, the defendant, Anan Henry, who is personally liable for the payment of the debt secured by the said mortgage, pay to the complainant the amount of such deficiency, with interest thereon as aforesaid, and that the complainant have execution therefor. The description and particular boundaries of the property authorized to be sold under this decree, so far as the same can be ascertained from the mortgage above re-
108 ferred to and the bill of complaint in this cause, are as follows: the west forty-four feet of lot No. seven (7,) on block one hundred and twenty-two in the said city of Omaha, as originally platted and lithographed by the Council Bluffs and Nebraska Ferry Company, together with the brick storehouse now erected and whatever building which may be hereafter erected thereon, fronting thereon forty-four feet on Farnham street, and extending back one hundred and thirty-two feet to the alley.

And thereupon afterwards, to wit, on the 7th day of December of the year aforesaid was filed in this court the master's report of sale of the above-described premises; which said report cannot be found in the files in this cause.

By consent of solicitors of parties, complainants and defendants, the testimony of James M. Woolworth be taken on part of defendant, on the return of said Woolworth home, and at the same time complainants may take the testimony of one other witness, to the testimony of which the defendant may offer rebutting testimony, and upon the taking said testimony the same in this cause shall be finally closed.

DAN. GANTT, *Master.*

109 TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, Daniel Gantt, master in chancery in and for said county, do hereby certify that the foregoing named witnesses, E. B. Chandler, Clinton Briggs, and James G. Megeath, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing depositions by them subscribed respectively, were reduced to writing by me, and were written in their presence, and were by them subscribed in my presence; that said depositions were taken at my office in Omaha, said county of Douglas, and the parties, complainants and defendants, were represented at said examination by their respective solicitors.

DAN. GANTT, *Master in Chancery.*

And thereupon on the same day and year aforesaid was filed in the clerk's office the depositions of James M. Woolworth, the same being in words and figures following, to wit:

Deposition of witness taken before me, a master in chancery, in and for Douglas county, Nebraska, at my office in Omaha city, in said

county, commencing April 30th, 1864, at 9 o'clock a. m., in a certain cause pending in the district court of Douglas county,
110 Nebraska Territory, in chancery, wherein Asa Hunt and others are complainants, and Ephraim H. Bender and others are defendants, in pursuance of an order of reference made by said court and to me directed, and taken by the consent of the counsel for the respective parties.

Redick & Briggs appear as so. for complainants.

Geo. B. Lake appears as sol. for def'ts.

DAN. GANTT, *Master in Chancery.*

James M. Woolworth, a witness produced, sworn, and examined on part of defendant, E. H. Bender, says:

Int. 1. Are you acquainted with the parties to this suit?

Ans. I am.

Int. 2. What relation did you sustain, if any, to this suit of E. H. Bender against Anan Henry and others, in chancery, brought to foreclose the mortgage given by Anan Henry and wife upon the premises in controversy in this suit?

Ans. I was solicitor and counsel for the complainant.

Int. 3. Will you state whether or not you at any time, as the solicitor of Ephraim H. Bender, entered into any arrangement with Charles A. Henry, or either of the defendants in said foreclosure suit respecting the redemption of said premises by them or either
111 of them? If so, state fully all the facts in relation thereto. (Objected by compl't. Objection waived.)

Ans. I made no agreement with Henry or any of the defendants, by which, after the sale, and after Bender should come into possession of the property as purchaser at the sale, either Charles A. Henry or any of the defendants should have the privilege of redeeming the property. I was at the same time counsel for Henry in a creditor's bill filed by John I. Redick and Franklin H. Eaton, and in the course of our consultations in reference to the matters in controversy in that suit something may have been said with regard to such redemption, although I do not now remember that anything was said upon that subject, nor do I remember of any other conversations upon that particular subject with Henry or any of the other defendants in any other connexion.

JAS. M. WOOLWORTH.

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, Daniel Gantt, master in chancery in and for said county Douglas, do hereby certify that the above-named witness, Jas. M. Woolworth, was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition by
112 him subscribed was reduced to writing by me, and was written in the presence of said witness, and by him subscribed in my presence; that said deposition was taken at my office in Omaha, said county, on the 30th day of April, A. D. 1864, by consent of parties.

DAN. GANTT, *Master in Chancery.*

Judgments and executions referred to in the bill of complaint, and offered in evidence on the hearing of this cause.

GEORGE ARMSTRONG
vs.
CHAS A. HENRY and ANAN HENRY. } 433.

Nov. 2, 1859. This cause having come on to be heard on the demurrer to the petition, it is ordered by the court that it be, and the same is hereby overruled. Thereupon this cause came on to be further heard, upon the proceedings and proofs, and the said defendant failing to appear in answer to his name as he is called, upon motion of John I. Redick, att'y for plaintiff, it is ordered by the court that his default be entered against him and judgment be en-
113 tered thereon. It is therefore ordered and adjudged that the plaintiff, George Armstrong, recover of the defendants, Charles A. Henry and Anan Henry, the sum of four hundred and forty-four and $\frac{58}{100}$ dollars, and his cost of suit in this behalf expended to be taxed.

(Signed) A. HALL, *Judge.*

And thereupon afterwards, to wit, on the 3d day of September, A. D. 1861, was issued out of the clerk's office an execution, which is in words and figures following, to wit:

The Territory of Nebraska to the sheriff of the county of Douglas, greeting :

Whereas George Armstrong, in the district court of the first judicial district of the Territory of Nebraska, in and for the county of Douglas, at the June term thereof, in the year 1859, and on the 2d day of November, A. D. 1859, obtained judgment against Charles A. Henry and Anan Henry, in the sum of four hundred and forty-four dollars and fifty-eight cents, and costs of suit, taxed at twelve dollars and 95 cents :

Now, therefore, in the name of the Territory of Nebraska, you are hereby commanded that of the goods and chattels and, for
114 want thereof, of lands and tenements of the said Charles A. Henry and Anan Henry found in your county, (except such as by law exempt,) you cause to be made the sum of four hundred and forty-four dollars and fifty-eight cents damages, and twelve dollars and ninety-five cents costs of suit, and accruing costs by virtue of this writ, together with interest thereon at the rate of 10 per centum per annum from the date of said judgment, to be rendered to the said George Armstrong. And have you the said sum of money at the office of the clerk of said court, at the city of Omaha, in said county, within sixty days from the date hereof, to render up according to law. And of this writ make legal service and due return.

Witness my hand and the seal of said court, at the city of Omaha, on the 3d day of September, A. D. 1861.

E. B. CHANDLER, *Clerk,*
By JOHN H. KELLOM, *Deputy.*

Indorsements on this execution were as follows:

Received for service Sept. 4th, 1861, at 4 o'clock p. m., and after diligent search I can find no goods or chattels, lands or tenements of the within named Charles A. Henry or Anan Henry, whereon to levy. September 13, 1861.

JOHN C. HILEMAN, *Sheriff Douglas Co.*

50 mileage.

115 Filed Sept. 13, 1861.

JNO. H. KELLOM, *Clerk.*

Damages, $444 58.

Costs of suit, $12 45.

JOSEPH P. MANNING
vs.
CHARLES A. HENRY. } 204.

May 3d, 1861. This cause having this day come on for trial, and due proof of the service of summons having been filed in this cause, and the said defendant having failed to appear and plead answer or demur to said plaintiff's petition within the time allowed by statute in such case made and provided, and the clerk being directed to assess the damages, assesses the same at $539 64; it is thereupon ordered and adjudged by the court that Joseph Manning, the plaintiff, recover of Charles A. Henry, the defendant, said sum of five hundred thirty-nine dollars and sixty-four cents, his damages and the costs of suit in this behalf expended to be taxed.

(Signed) WILLIAM P. KELLOGG,
Judge 1st Judicial District.

And thereupon afterwards, to wit, on the 3d day of September, A. D. 1861, was issued out of the clerk's office on execution, which is in words and figures following, to wit:

116 The Territory of Nebraska to the sheriff of the county of Douglas, greeting:

Whereas J. P. Manning, in the district court of the first judicial district of the Territory of Nebraska, in and for the county of Douglas, at the March term thereof, in the year 1861, and on the 3d day of May, A. D. 1861, obtained judgment against C. A. Henry in the sum of five hundred and thirty-nine dollars and sixty-four cents, and costs of suit, taxed at four dollars and thirty cents:

Now, therefore, in the name of the Territory of Nebraska, you are hereby commanded that of the good and chattels, and for want thereof, of the lands and tenements, of the said C. A. Henry found in your county, (except such as are by law exempt,) you cause to be made the sum of five hundred and thirty-nine dollars and sixty-four cents damages, and four dollars and thirty cents cost of suit, and accruing costs by virtue of this writ, together with interest thereon at the rate of 10 per centum per annum from the date of said judgment, to be rendered to the said J. P. Manning.

And have you the said sum of money at the office of the
117 clerk of said court, at the city of Omaha, in said county, within sixty days from the date hereof, to render up according to law. And of this writ make legal service and due return.

Witness my hand and the seal of said court, at the city of Omaha, on the 3d day of September, A. D. 1864.

[SEAL.] E. B. CHANDLER, *Clerk*,
By JNO. H. KELLOM, *Deputy*.

The following indorsements appear on said execution:

Rec'd for service September 4th, 1861, at 4 o'clock p. m., and after diligent search I can find no goods or chattels, lands or tenements of the within named Charles A. Henry whereon to levy.

JOHN C. HILEMAN, *Sh'ff Douglas Co.*

Sept. 13, 1861.
50 mileage.
Filed Sept. 13, 1861.

JNO. H. KELLOM, *Clerk*.

Damages, $539 64.
Costs, $4 30.

F. H. EATON
vs.
CHAS. A. HENRY, ANAN HENRY, and HENRY H. VISSCHER. } 302.

118 July 11, 1860. This cause having come on to be heard upon the demurrer filed herein, and the same having been submitted to the court is overruled. Thereupon this cause came on to be further heard upon the demurrer of Visscher, one of the defendants in this cause, on consideration whereof said demurrer is sustained. Thereupon this cause came on to be further heard upon the petition and the proofs; and the court being fully advised in the premises, and the clerk being directed to assess the damages, assesses the same at $687 17.

It is thereupon ordered and adjudged that Franklin H. Eaton, the plaintiff, recover of Charles A. Henry and Anan Henry, two of said defendants, said sum of six hundred eighty-seven and $\frac{17}{100}$ dollars, his damages, and his costs of suit in this behalf expended to be taxed.

(Signed) A. HALL, *Judge*.

And thereupon afterwards, to wit, on the 3d day of September, A. D. 1861, was issued out of the clerk's office an execution, which was in words and figures following, to wit:

The Territory of Nebraska to the sheriff of the county of Douglas, greeting:

119 Whereas Franklin H. Eaton, in the district court of the first judicial district of the Territory of Nebraska, in and for the county of Douglas, at the June term thereof, in the year 1861, and on the 11th day of July, 1861, obtained judgment against Charles A. Henry and Anan Henry in the sum of six hundred and eighty-seven

dollars and 17 cents and costs of suit, taxed at sixteen dollars and 70 cents:

Now, therefore, in the name of the Territory of Nebraska, you are hereby commanded that of the goods and chattels, and for want thereof, of the lands and tenements, of the said Charles A. and Anan Henry found in your county, (except such as are by law exempt,) you cause to be made the said sum of six hundred and eighty-seven dollars and 17 cents damages, and sixteen dollars and 75 cents costs of suit and accruing costs by virtue of this writ, together with interest thereon, at the rate of 10 per centum per annum, from the date of said judgment, to be rendered to the said Franklin H. Eaton. And have you the said sum of money at the office of the clerk of said court, in Omaha, in said county, within sixty days from the date hereof to render up according to law.

And of this writ make legal service and due return.

120 Witness my hand and the seal of said court, at the city of Omaha, on the 3d day of September A. D. 1861.

[SEAL.] E. B. CHANDLER, *Clerk*,
By JNO. H. KELLOM, *Deputy*.

The following indorsement appears on this execution:

Rec'd for service September 5th, 1861, at 4 o'clock p. m., and after diligent search I can find no goods or chattels, lands or tenements of the within named Charles A. Henry and Anan Henry whereon to levy.

JOHN C. HILEMAN, *Sh'ff Douglas Co.*

Sept. 13, 1861.
50 mileage.

Filed Sept. 13th, 1861.

JNO. H. KELLOM, *Clerk*.

Damages, $687 17.
Costs, $16 75.

ASA HUNT
vs.
CHARLES A. HENRY. } 261.

Oct. 28, 1861. This cause having come on to be heard, the parties, by their attorneys, agree that judgment be entered against said defendant, Charles A. Henry, in the sum of five hundred ninety-six and $\frac{20}{100}$ dollars damages, and the costs of this suit. It is

121 thereupon ordered and adjudged by the court that Asa Hunt, the plaintiff, recover of Charles A. Henry, the defendant, the said sum of five hundred and ninety-six dollars and twenty cents, his damages, and the costs of this suit in this behalf to be taxed.

(Signed) J. E. STREETER, *Judge*.

And thereupon afterwards, to wit, on the 7th day of March, A. D. 1862, an execution was issued out of the office of the clerk, the same being in words and figures following, to wit:

THE TERRITORY OF NEBRASKA, *Douglas County, ss:*

To the sheriff of Douglas county, greeting:

Whereas, at the October term, A. D. 1861, of the district court in and for said county of Douglas, Asa Hunt obtained against Charles A. Henry a judgment for $596 20 damages, and $4 the costs of suit, as appears by the records of said court: Therefore, in the name and by the authority of said Territory, we command you, Thomas L. Sutton, sheriff of Douglas county, that of the good and chattels, and for want thereof, of the lands and tenements, of the said Charles A. Henry found in your county, you cause to be made the amount of said
122 judgment and costs, with interest thereon from the 28th day of October, A. D. 1861, until paid, together with accruing costs, by virtue of this writ, and have the said several sums of money, with the accruing costs and this writ before the clerk of the district court, at Omaha, within sixty days, then and there to render unto the respective persons entitled thereto.

Witness my signature and the seal of our said district court, this 7th day of March, A. D. 1862.

[SEAL.] J. H. KELLOM, *Clerk.*

The following indorsement appears thereon:

Received for service March 7th, A. D. 1862. No goods, chattels, lands, or tenements of the within named Charles A. Henry found in my county whereon to levy this execution.

THOMAS L. SUTTON,
Sheriff of Douglas County, N. T.

Fees, 20.

Returned and filed March 22, 1862.

J. H. KELLOM, *Clk.*

Damages, $596 20.
Costs, $4.
Increase costs, 65.

And thereupon afterwards, to wit, on the 25th day of July,
123 1864, Hon. W. P. Kellogg, judge, the decree in said cause was filed in the clerk's office, which is in words and figures following, to wit:

ASA HUNT, GEORGE ARMSTRONG, FRANKLIN H. Eaton, and others,
vs.
EPHRAIM H. BENDER and OTHERS.
} In chancery.

This day came the said complainants, by Redick & Briggs, their solicitors, and the said defendant, Ephraim H. Bender, by George B. Lake, his solicitor, and thereupon this cause came on to be heard upon the said complainants' said bill, the answer of the said defendant, Bender, the replication thereto, and the exhibits and proofs adduced in open court; and the court, being fully advised in the premises, finds all the equities of the case with the said defendant, Ephraim H. Bender.

It is therefore ordered, adjudged, and decreed that the said bill of the said complainants be, and the same is hereby, dismissed, and that the said defendant, Ephraim H. Bender, go hence without day, and recover of the said complainant his costs in this behalf expended to be taxed, and that execution issue to collect the same as upon
124 judgment at law.

The said complainants gave notice of and prayed an appeal from this decree to the supreme court.

July 25th, 1864.

WILLIAM P. KELLOGG, *Judge.*

And thereupon afterwards, to wit, on the 26th day of July, in the year aforesaid, a notice of appeal was filed in the clerk's office, the same being in words and figures following, to wit:

In chancery in the district court, Douglas county, Nebraska Territory.

ASA HUNT *et al.*
vs.
E. H. BENDER *et al.*

Take notice that the complainants in the above-entitled cause have prayed and will prosecute an appeal to the supreme court of the Territory of Nebraska from the order made in the district court on the 25 day of July, 1864.

REDICK & BRIGGS,
Sol. for Complainants.

125 TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, J. H. Kellom, clerk of the district court, first judicial district, within and for the county of Douglas, do certify that the foregoing is a true and faithful transcript of all the proceedings had and entered of record in this office.

Witness my hand and the official seal of said court, at Omaha, this 9th day of January, A. D. 1865.

[SEAL.] J. H. KELLOM, *Clerk.*
[U. S. I. R. 5c.]

Supreme Court of the United States.

ASA HUNT, *et al.*, *Appellanis*,
vs.
EPHRAIM H. BENDER, *et al.*
No. 103.

ARGUMENT FOR APPELLANTS.

Appeal from a decree of the Supreme Court of the late Territory of Nebraska.

Appellants filed their bill in Court below, alleging that Anan Henry, (appellee,) was seized of a lot in Omaha; that on a part of the lot there was a brick building, and another in process of erection on the lot at a cost of from $6,000 to $10,000; that the appellants are all judgment creditors of the Henrys, (appellees,) on which judgments execution were issued and returned wholly unsatisfied before the bill was filed; that the consideration of the judgments was labor and materials furnished in the erection of the building; that the Henrys were insolvent on the 13th of August, 1857, and have continued so; that August 15, 1857, Anan Henry executed a mortgage on the property to Bender, (appellee,) to recover the payment of a note of $4,080, due in one year, with interest, at 3 per cent. a month after due; that Henry received a much less sum, if anything, from Bender, and charging that the mortgage was given to cover up the property in order to defraud creditors, and that Bender had knowledge of this and of the Henrys' insolvency when he took the mortgage; that in February, 1859, Bender brought suit in chancery, in order to foreclose the mortgage, but not,

however, until after a suit had been commenced by other creditors to subject this property to the payment of their debts; that the foreclosure suit was commenced in order to defeat those creditors by covering up the property; that there was no legal service of subpœna on the mortgagor; that he made no appearance, yet the bill was taken *pro confesso*, and decree of $5,500 rendered, and the property sold to Bender under it for that sum, when it was worth from $12,000 to $18,000, but without due notice of the time and place of the sale being given; that Bender and C. A. Henry entered into an agreement, by the terms of which Henry agreed not to bid at the sale, and Bender agreed to let him redeem the property at any time by paying the money with interest; that the Henrys did not bid at the sale; that C. A. Henry consented to the confirmation of the sale, but that he was not authorized to do so by the mortgagor; that Bender has ever since the sale been in possession of the property, receiving the rents and profits which have amounted to more than his debt; that Bender is the fraudulent trustee of the Henrys, and praying that the judgments be declared a lien on the property; that the foreclosure proceedings are *void*, and for general relief. Answer under oath is waived.

The bill is taken *pro confesso* as against the Henrys. But Bender filed his answer denying most of the allegations of the bill.

General replication filed to answer.

We think the testimony in the case establishes the following ultimate facts:

1. That before filing the bill the appellants were judgment creditors of the Henrys, and that executions had been issued and duly returned wholly unsatisfied, (see Record, pages 48, 49, 50, 51, 52,) and that the consideration of the judgments was labor and materials furnished in the erection of a building on the lot, (see testimony of

Chambers, p. 27; of Armstrong, p. 29; of C. A. Henry, p. 33;) and, further, that Bender, through his agent, Moffat, was advised of this fact and of the insolvency of the Henrys. (See testimony of C. A. Henry, page 32.)

2. That Bender only loaned $3,000 to Henry, and that this sum was Omaha script of less than par value. (See testimony of Bender, p. 25; of Moffat, p. 23; of Estabrook, p. 38; of C. A. Henry, p. 31.)

3. That the mortgagor, Henry, had no legal notice of the pendency of the suit to foreclose the mortgage. (See subpœna and return, page 43.)

4. That the property was worth, when sold, $15,000, and was renting for at least $2,000 per annum; but that, notwithstanding, the same was bid in by Bender for $5,500, and that he has ever since been in possession, receiving the rents and profits. (See testimony of C. A. Henry, p. 83; of Armstrong, p. 29; Answers 17, 18.)

5. That the name of the Judge to the order of confirmation is a forgery. (See order, p. 35; testimony of Estabrook, p. 37; of Chapman, p. 37; of Chambers, p. 40. And further, that C. A. Henry had no right or authority to sign the name of the morgagor to the order, as agent, or as an attorney, for he was not an attorney at law. (See testimony of C. A. Henry, p. 33; of Anan Henry, p. 36.) But that this scheme on the part of C. A. Henry was the result of an arrangement made between him and Bender, by which Henry was not to bid on the property at the sale, and Bender was to give him some of the rents and the right to redeem on paying the amount of money loaned and interest. (See testimony of C. A. Henry, pages 33, 34.)

I.

What the appellants want is, to have the foreclosure proceedings set aside, that the judgments may be liens on the property, so as to enable them to redeem. If the decree of

foreclosure is only *erroneous*, then they would not have the right to attack it in a collateral proceeding; but, if it is *void*, they have.

The foreclosure of a mortgage by action is a suit *in personam* not *in rem*, and unless the Court acquires jurisdiction of the proper parties by legal process, legally served, the Court cannot proceed to a decree; and, if it does, the decree will be void, provided the defendant does not make an appearance.

To determine whether the Court acquired jurisdiction of the *person* of the mortgagor, we must look into the rules which this Court has established to regulate process and proceedings in equity in the Circuit Courts of the United States.

See Noonan *vs.* Lee, 2 Black, 499, where it is held that State legislation cannot interfere in this matter; and see also Orchard *vs.* Hughes, 1 Wallace, 73, where it is held that these rules govern the practice in the Territorial Courts established by Congress.

The pretended subpœna itself is wanting in three essential particulars, (see page 43:)

1. There is no return day mentioned in the subpœna, and no direction to the officer to return it at all, (rules 12, 17.)

2. There is no memorandum indorsed on the subpœna notifying the defendant to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable, or otherwise the bill will be taken *pro confesso*, (see rule 12.)

3. The defendant was required to answer on the 5th of March, 1859. That was not a rule day. It was the first *Tuesday*, and not the first *Monday* of the month.

But if the subpœna itself had been regular, the service would even then be void, and for the reason that it was made by a *Sheriff* of the county.

Rule 15 provides in express terms that "all process mense

and final shall be served by the Marshal of the district, or by some person specially appointed by the Court for the purpose, and *not otherwise*." There is nothing showing that the Sheriff was appointed by the Court to make the service.

It may be claimed that the mortgagor consented to the confirmation of the sale, and thereby made an appearance. As to this it is shown by the record:

1. That the name of the Judge to the order is a forgery; and

2. That Charles A. Henry was not the agent of the mortgagor in the premises; and if he was he could not appear in Court for the defendant *as agent*. Parties can only appear in Court in person, or by an attorney of the Court; and it is shown that Charles A. Henry was not such attorney.

If appellant's judgments had been recovered before the alleged foreclosure suit had been commenced, then they would have had the right to commence suit to redeem; but, being subsequent judgment creditors, they can in no way reach the property until after the alleged foreclosure proceedings are out of the way. Then they can tender the amount due to the mortgagee, if any thing, and file their bill to redeem. For in equity the mortgagee has no interest in the property further than such as may be necessary to enable him to recover his demand. If he takes possession he must account for the rents and profits, and any judgment creditor has the right to redeem on paying what is due, and to be subrogated to all the rights of the mortgagee.

The claims of the appellants are certainly meritorious, being for labor and materials furnished in improving the property and making it valuable, and they have exhausted all their legal remedies for the collection of their demands; and it seems but equitable that this property, which is shown to be worth at least $15,000, with an annual rental of $2,000, should not all be absorbed in satisfaction of Bender's claim of only $3,000 and interest; but it would seem just that the creditors and others should be entitled to all that may re-

main after Bender is fully paid. The record shows any thing but fair and honest dealing on the part of the appellees in that mortgage transaction, and the Court will not lend its aid to sustain such a transaction, unless the rigid rules of law imperatively demand it.

The appellants ask that the decree appealed from be reversed and the decree of foreclosure and all proceedings under it be declared void.

REDICK & BRIGGS,
Of Counsel for Appellants.

IN THE

Supreme Court of the United States.

ASA HUNT, FRANKLIN H. EATON, JOSEPH P. MANNING and GEORGE ARMSTRONG, Appellants,

against

EPHRAIM H. BENDER, impleaded with CHARLES A. HENRY, and ANAN HENRY, Appellee.

Abstract and Points for E. H. Bender, Appellee.

The present appeal is from a decree of the Supreme Court of the Territory of Nebraska made in 1865, by which the complainants' bill was dismissed with costs (fols. 3, 124).

The bill was filed by the complainants as judgment creditors of Charles A. and Anan Henry to subject certain real estate in Omaha to the payment of their judgments, and the leading facts of the case as disclosed by the record, are the following:

In August, 1857, Anan Henry was the owner of the west 44 feet of lot No. 7, on block No. 122 in the city of Omaha, as originally platted and lithographed by the Council Bluffs and Nebraska Ferry Company, and on the 15th day of August, 1857, he borrowed of Bender, who lived at Albany (fol. 114), $3,000 for one year at three per cent per month, for which he gave his note for $4,080.00 payable at the end of 12 months (which embraced the principal and interest), and as a collateral security for the payment of the note he gave Bender a mortgage on the real estate above referred to, with the brick storehouse then erected and whatever buildings might thereafter be erected thereon, fronting 44 feet on Farnham street and extending back 132 feet to the alley (fols. 9, 29, 58, 62, 74).

This mortgage was duly recorded so as to make it a lien on the real estate in question, and, at the end of the year, the note to which it was collateral was not paid.

Afterwards, and early in 1859, Bender commenced proceed-

ings in the Supreme Court of Nebraska, for the foreclosure of his mortgage (fol. 102), against the two Henrys and their wives, James H. Ford and Franklin H. Eaton, and one Milton H. Rogers, which resulted in a decree of foreclosure and sale on the 23d of March, 1859 (fols. 104, 105). The mortgaged property was duly sold under this decree, and Bender became the purchaser (fol. 131). The sale was confirmed (fol. 85), and Bender went into possession in December, 1859, and has since so continued.

In March, 1862, the present complainants filed their bill in Chancery in Douglas county, in the first Judicial District of the Supreme Court of the then Territory of Nebraska against Bender and the two Henrys, to set aside the foreclosure and sale by Bender under his mortgage, and to subject the property in question to the payment of certain judgments against the Henrys.

It appears that on the 2d of November, 1859, the complainant Armstrong received a judgment against Charles A. and Anan Henry (fols. 7, 113), for $444.58 damages, and $12.95 costs. The complainant, Manning, on the 3d of May, 1861, recovered a judgment against Charles A. Henry for $539.64 damages, and $4.80 costs (fols. 7, 115).

On July 11, 1861, the complainant Eaton recovered against the two Henrys and another a judgment for $687.17 damages, and $16.75 costs (fols. 8, 118, 119), and on the 28th of October, 1861, the complainant Hunt recovered a judgment against Charles A. Henry for $596.20 damages and costs (fols. 8, 121). Executions upon all these judgments were issued before the commencement of this suit, and returned unsatisfied (fols. 114, 116, 119, 122).

The equity of the bill rested upon the allegation of fraud and collusion between Bender and the Henrys, and all these allegations were fully met and denied by the answer of Bender.

The proof was clear that in August, 1857, Bender, through his agent Moffat, a banker at Omaha, loaned the Henrys $3,000 at three per cent a month (a rate of interest then common, and allowed in the territory of Nebraska), and took the note and mortgage referred to in the pleadings and proof (fols. 57, 58, 60, 62, 63, 75), and so far as the case shows the foreclosure was entirely regular, and there was no proof of any such fraud or collusion as was alleged in the bill.

There was evidence tending to show that the judgment of the complainant Eaton was recovered for brick and materials furnished the Henrys under a contract between July and October, 1857, used in the erection of a building on the premises covered by the mortgage of Bender (fols. 67, 68).

The judgment of Armstrong was recovered also for work and materials for the same purpose, during 1857 (fols. 71, 72).

The complainants Hunt and Manning were the builders (fols. 71, 72), and it is supposed that their judgments were obtained for services performed in the erection of buildings upon the premises in question.

So far as any other questoins of fact are regarded as material, they will be referred to in the following

POINTS FOR E. H. BENDER, APPELLEE.

I. Every allegation of fraud and collusion between Bender and the Henrys, was emphatically denied by the answer, and no proof was given to sustain the bill in this respect, but in fact the allegations were affirmatively disproved (fols. 57, 63, 111).

1. It is not questioned but that Anan Henry on the 15th of August, 1857, gave to Bender a mortgage on the premises in question which was duly recorded and became a specific lien thereon, to secure the payment of the loan of $3,000 and interest within a year, and it is not denied that default was made in the payment. The mortgage was regularly foreclosed, and after due notice the premises were sold and Bender became the purchaser, and as against the complainants his title is perfect, for they had no lien on the premises prior to the mortgage of Bender.

2. The fact that the complainants, one or all, had before or about the time of the giving and recording of the mortgage of Bender, furnished materials or performed services towards the erection of a building on the premises, gave them no lien as against the mortgage of Bender, and indeed no lien whatever on the real estate as against anybody. They had only a personal demand against the Henrys, and so they regarded it, as they commenced no proceedings until after they had obtained judgments, and then their reliance was upon the supposed fraud and collusion between Bender and the Henrys, of which no proof could be given, as the facts did not exist.

3. The complainants were not necessary parties to the foreclosure, for at the time they had no lien on the premises, either prior or subsequent to the mortgage of Bender. Moreover, if the complainants had any right to interfere, the correct practice in equity required them to move in the foreclosure suit to open proceedings or set them aside. A suit to set aside a decree in another suit in the same court, except under very special circumstances, ought not to be allowed.

II. The only ground upon which the complainants claimed relief was the supposed fraud and collusion between Bender and the Henrys in respect to the foreclosure of the mortgage, by reason of which some equitable interest in the property remained in the Henrys, one or both, which could be reached by their judgment creditors.

1. The loan of the money, and the giving the mortgage and its validity, is not questioned, and it was not paid. This being so, Bender had the unquestionable right to foreclose it without any regard to the wishes of the Henrys, or either of them, and without regard to the fact whether they were or were not insolvent, or whether they were indebted to the complainants or not. Bender had only to look to the record to see what liens existed against the property, and the complainants had none, and at the time the mortgage was given they did not pretend to have any (fol. 59).

2. The mortgage being valid and having been regularly foreclosed and sold under a decree of the court, Bender, the purchaser at the sale, acquired a perfect title as against all the world. If there was anything irregular or unfair on the sale the remedy for any party aggrieved was to apply to the court to set it aside and for a resale.

3. If the decree was right and the sale regular, the fact that the property some years after was worth more than Bender paid for it, is of no account. In a growing city the fact that real estate increases in value is not any evidence of fraud.

4. There was a feeble effort to show that the $3,000 loaned by Bender was paid in a depreciated currency, called "Omaha Scrip." The case does not show what kind of currency this was. Yet it was at par with all other currency in the Territory (fols. 60, 99, 100), and it was received (if received at all by C. A. Henry), without material objection, and there is no sufficient evidence to show that this scrip was not worth all it purported to be, and there was no proof of any failure of the consideration of the mortgage.

The decree of the Supreme Court of the Territory of Nebraska should be affirmed with costs.

JOHN H. REYNOLDS,
of Counsel for E. H. Bender, Appellee.

Supreme Court of the United States.

ASA HUNT, et al., Appellants,

against

EPHRAIM H. BENDER, Appellee.

No. 103.

SUPPLEMENTAL POINTS FOR E. H. BENDER, APPELLEE.

I. The Henrys, or either of them, have not appealed from the decree of the Territorial Court of Nebraska, and cannot be heard against its correctness. It is only the plaintiffs who find fault with it, in fact neither of the Henrys "are to be regarded as appellees" as the appellants seem to claim, and it is not of much importance whether they are or not.

1. Anan Henry seems to be oblivious, for he denies that any mortgage was executed (fol. 87).

2. The fact that the money was loaned and the mortgage given, was not in dispute, and is not now, and to all that Anan Henry says may be regarded as idle. It sufficiently appeared that Anan Henry acted through his son as agent, and he received the money and executed the mortgage (fols. 59, 60).

3. There is no complaint that any illegal rate of interest was exacted.

4. And C. A. Henry was the agent of Anan Henry. That is obvious from all the proofs.

II. It may be admitted that if any fraud could be proved against the decree of foreclosure or sale in the court below, it might prevail.

